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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1111

MARY M. CARROLL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Respondent,

vs.

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Talman Federal Savings and Loan Association of Chicago, the named defendant in the underlying action, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on October 18, 1979 denying a petition for rehearing and suggestion for rehearing en banc of a judgment entered August 21, 1979. That judgment reversed a February 28, 1978 judgment by the United States District Court for the Northern District of Illinois, Eastern Division, which had granted summary judgment for Petitioner and dismissed the case.

OPINIONS BELOW.

The judgment, opinion and dissenting opinion of the United States Court of Appeals for the Seventh Circuit, published at 604 F. 2d 1028 (7th Cir. 1979) are reproduced as Appendix ("App.") A to this Petition. The judgment and opinion of the United States District Court, entered February 28, 1978, granting summary judgment for Petitioner and dismissing the case, which was reversed by the Court of Appeals, is reproduced as App. B and is published at 488 F. Supp. 79 (N. D. E. D. Ill. 1978).

JURISDICTION.

The United States Court of Appeals for the Seventh Circuit refused on October 18, 1979 to grant Petitioner's petition for rehearing and suggestion for rehearing en banc of the judgment entered by a majority of a panel of that court reversing the judgment of the United States District Court. The order of the Court of Appeals is reproduced as App. C. This petition was filed within 90 days of that date. This Court has jurisdication to review the Court of Appeals' judgment by Writ of Certiorari pursuant to 28 U. S. C. § 1254.

QUESTION PRESENTED.

Whether an employer is guilty of illegal sex discrimination against its women employees under the Equal Employment Opportunity Act because its grooming and dress code did not make the same clothing requirements for men and women when the undisputed evidence was that there was no actual adverse impact on the employment opportunities, status, compensation, terms, conditions or privileges of women or any individual woman.

STATUTE INVOLVED.

This case involves the interpretation of the following provisions:

1. Section 703(a) of the Equal Employment Opportunity Act, which is Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-2(a)), which provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE.

A. Nature of the Litigation.

Plaintiff-Respondent, Mary M. Carroll, ("Carroll"), instituted an action against Defendant-Petitioner, Talman Federal Savings and Loan Association of Chicago, ("Talman") alleging that Talman's written grooming and dress code discriminated against its women employees on the basis of sex in violation of the Equal Employment Opportunity Act (Title VII of the Civil Rights Act of 1964; 42 U. S. C. § 2000e *et seq.*). Carroll claimed to represent herself and all others similarly

situated and sought declaratory and injunctive relief and monetary damages.

Plaintiff filed a motion for summary judgment and Talman filed a counter-motion for summary judgment based on the undisputed facts obtained from documents produced, written interrogatory answers and deposition testimony obtained through discovery. Neither party claimed, nor did the District Court find, any disputed questions of material fact.

The District Court (the Honorable Joel M. Flaum, Judge, presiding) granted Talman's motion for summary judgment and dismissed the action. The District Court's written opinion was published at 448 F. Supp. 79 (N. D. Ill. E. D. 1978).

Plaintiff appealed the District Court's judgment. A majority of a panel of the Court of Appeals for the Seventh Circuit reversed the District Court's action and directed it to enter summary judgment for plaintiff and to afford her appropriate relief based on her relief prayers. Talman filed a petition for rehearing and suggestion for hearing en banc; that petition was denied. The original opinion for the majority of the panel of the Court of Appeals (by Cummings, J.) and a dissenting opinion (by Pell, J.) were published at 604 F. 2d 1028 (7th Cir. 1979).

Prior to the filing of her motion for summary judgment in the District Court, Petitioner had filed a Motion for Class Action Certification. Before that motion was ruled on both parties filed their motions for summary judgment. Consequently, the class action issues were not dealt with and no issue concerning them is raised here.

Although no issue concerning it was raised in the courts below or is raised here, before the filing of her action in the District Court, plaintiff had filed with the Equal Employment Opportunity Commission ("EEOC") a Charge of Discrimination. The charge alleged that Talman was engaged in sex discrimination and this discrimination involved that women must wear "a given uniform" while men are allowed to wear "the jacket of their choice".

Based on only informal discussions and communications with the parties separately, the EEOC issued a "Determination" that it had reasonable cause to believe the complainant's allegation was true. However, the EEOC further determined that it would not bring a civil action against Talman but issued to complainant a Notice of Right to Sue.

B. The Grooming and Dress Code.

Talman has for many years had a grooming and dress code which is applicable to all employees and officers, whether men or women. That code, which is part of Talman's Personnel Policies Manual,[1] presently provides:

Personal Appearance.

> To present a pleasant and business-like appearance to our customers at all times, the basic rules of personal cleanliness and good grooming must be followed by all employees.
>
> Women employees shall wear current career ensembles each working day except the last Tuesday of each month or as may be specified.
>
> Men may wear either the customary business suits or a combination of business-type sport jacket and pants. Ties shall be worn by men.
>
> During business hours and while in areas accessible to or in view of customers, employees shall not remove their suit jackets.

1. P. App. 113-114 "P. App." references are to Plaintiff's Appendix filed in the Court of Appeals.

Uniforms,
Career Ensembles

Uniforms shall be furnished by TALMAN to all maintenance, housekeeping, supply room, security staff, cooks and parking lot attendants.

In the interim between regular uniform changes, TALMAN shall secure and pay for all the necessary replacement costs on all uniforms.

TALMAN shall pay the entire cost of one career ensemble for all female employees who do not get a uniform. This career ensemble cost is considered as income by Internal Revenue Service and subject to income tax.

A career ensemble is comprised of one jacket or vest and one skirt or slacks.

Career ensembles become the property of the employee. Therefore, employees are responsible for all cleaning, maintenance and repairs required to present a pleasant and business-like appearance.

The grooming and dress code, by its express terms, applies to both male and female employees. Both are required to present a pleasant and business-like appearance to customers at all times. Both must follow the basic rules of personal cleanliness and good grooming.

Clothing requirements apply to both men and women. The women are required to wear current career ensembles and the men are required to wear either customary business suits or a combination of business-type sport jacket and pants. Ties must be worn by all men but not by women. Both men and women may not remove their jackets during business hours and while in areas accessible to or in view of customers.

The career ensembles referred to in the grooming and dress code are eight different color-coordinated garments from which the women employees individually choose their two-piece career

ensembles. These are selected by a Career Ensemble Committee consisting of a cross-section of Talman's women employees.[2] That Committee also acts in an advisory capacity to Talman as to the entire career ensemble program, suggests any needed changes and recommends "guidelines" for implementation of the program; it also receives suggestions about the program and the career ensembles from any women employees.[3]

C. The Career Ensembles.

Career ensembles are worn by all women tellers and office and managerial personnel, including the highest officers (senior vice president, treasurer and senior investment officer).[4] The only "uniforms" worn by any men or women employees are quite different[5] and are worn by only "maintenance, housekeeping, supply room, security staff, cooks and parking lot attendants" as well as couriers.[6]

A career ensemble consists of two pieces, a blazer or a jacket or a tunic and a skirt or slacks. These basic pieces may be long or short sleeved or sleeveless and belted or unbelted and include different types of skirts.[7] Each individual employee selects which of these she wishes and different combinations may be worn from day to day by each individual as she wishes.[8]

A Spring career ensemble and a Fall career ensemble are furnished by Talman to each woman employee.[9] The colors and styles change from season to season and year to year.

Talman pays the entire cost of one Spring and one Fall career ensemble for each woman employee. The career ensembles

2. P. App. 38, 39.
3. Supp. App. 20; P. App. 38, 39. "Supp. App." references are to the Supplemental Appendix filed in the Court of Appeals.
4. P. App. 30, 90.
5. P. App. 54, 55.
6. P. App. 32, 54, 55, 114.
7. Supp. App. 1.
8. P. App. 43.
9. P. App. 109.

become the property of the employee and may be worn while not at work.[10]

The Career ensembles contain no name, insignia or color identifying them with Talman and are entirely suitable for street wear.[11] As a result the Internal Revenue Service considers the wholesale cost of the career ensembles as income to the women and Talman is compelled to withhold income tax on their value.[12]

With their career ensembles, each woman employee wears other clothing entirely of her individual choice, consisting of blouses, sweaters, scarfs, hosiery and shoes as well as jewelry.[13]

The appearance of the individual women employees is quite varied as a result of the different combinations of career ensembles worn from day to day by the different women, and the varied appearance of the different pieces of the ensembles, plus the variety of other clothing worn with them by the individual women.

A photograph of some of the varied career ensembles and other clothing worn by the women appears in the opinion of the Court of Appeals in Appendix A at page A4.

D. Reasons for Grooming and Dress Code.

Talman's dress and grooming code was adopted for a number of legitimate business reasons. Neat, clean personnel in business-like attire is part of its public "image". Efficient, courteous and business-like service to the public has long been a primary and effective competitive tool for Talman.[14] It is important to Talman because its competitors (other savings and loan associa-

10. P. App. 44, 114.
11. P. App. 36, 44, 114.
12. P. App. 36, 114.
13. P. App. 36-37, 115.
14. P. App. 42.

tions and financial institutions) offer nearly identical savings accounts and loans.

The clothing requirements of Talman's grooming and dress code are an important part of its competitive measures because it assures that its employees project an appropriate, businesslike appearance.[15] Many years' experience with the career ensemble requirements for the women employees has shown that they contribute to Talman's good relations with its customers and its women employees.

The women employees overwhelmingly favor the career ensembles.[16] Talman instituted the career ensembles requirements at the request of its women in the winter of 1942 to reduce expense of the women employees, to eliminate problems about what constituted appropriate business attire for women employees and to assure that the women employees' attire presented a businesslike appearance.[17] Talman has continued the career ensembles for the same reasons as well as for the other reasons for which it has a grooming and dress code.[18]

Overwhelming support for the career ensembles by the women has continued through the years, as oral and written polls and informal comments have shown.[19] Respondent is the only woman employee who has ever objected to the career ensembles and refused to wear the career ensembles, and her action produced antagonism toward her from other women employees.[20]

Experience has shown Talman that it is more difficult to define what is businesslike attire for women than it is for men because the great diversity of women's clothing, questions of differing tastes and the existence of numerous borderline and

15. Supp. App. 14; P. App. 42.
16. P. App. 33, 40.
17. P. App. 30-31, 41-42; Supp. App. 6, 8.
18. Supp. App. 6-8, 9.
19. P. App. 31, 33, 40.
20. P. App. 38-39, 43; Supp. App. 12.

questionable attires.[21] Because of this diversity Talman's managers face frequent difficult decisions over individual women employee's attire when the career ensembles are not worn. Because of the much lesser variation in men's attire, such problems rarely arise concerning the men employees' clothing and when they do the problems are readily resolved.[22]

Experience has shown that the career ensembles also improve relations with the women employees because they reduce difficulties with individual women employees over what is appropriate and businesslike[23] and reduce controversies between employees and the managerial staff.[24] In fact, problems about questionable clothing of women employees are nearly eliminated when the career ensembles are worn.[25]

Talman has found that the career ensembles are superior in achieving a businesslike appearance, to the public.[26] On the last Tuesday of each month (to permit cleaning) and traditionally during Christmas week and a week in August women, employees may wear any clothing they wish so long as it is appropriate business attire; many women prefer to wear the career ensembles then also.[27] Experience has shown that most problems over appropriate business attire occur during those periods.[28]

Talman's relations with its customers are improved by the women's career ensembles. Customers comment favorable on the career ensembles and unfavorably on the days when they are not worn, and there are fewer customer complaints about women employees' apparel on career ensemble days. The

21. P. App. 80, 82.
22. P. App. 35; Supp. App. 12-13.
23. Supp. App. 8, 10, 11, 13, 17-18.
24. Supp. App. 11, 17-18; P. App. 80, 82.
25. P. App. 80, 82; Supp. App. 11, 17.
26. Supp. App. 2-4.
27. P. App. 73-74; 40-41.
28. Supp. App. 10, 13.
29. Supp. App. 13-15, 17.

career ensembles reduce the problems of unbusinesslike appearance to the public.[30]

Experience has shown Talman that the career ensembles better achieve a businesslike appearance than do any other dress requirements.[31]

Talman's grooming and dress code has nothing to do with hiring, promotion, benefits, status, salary, seniority, training, retirement, etc. In fact, 78.5% (523) of Talman's 673 tellers and office and managerial employees are women and only 21.5% (145) are men.[32]

E. Respondent's Status.

Respondent, who has always been only a part time employee of Talman, was hired as a teller-trainee in 1973. She adhered to the grooming and dress code until May 1976 when she refused to continue to wear career ensembles.[33] She was then suspended (but her insurance and seniority rights were continued by Talman) because her refusal to wear a career ensemble detracted from the businesslike appearance which Talman was attempting to establish and maintain at a new branch office where she was employed. Her refusal to do so antagonized her co-workers and distracted them and affected their performance and morale.[34]

At respondent's request, her suspension was lifted by Talman and she returned to work as a part-time employee in May 1978. She then adhered to the grooming and dress code, and wore the career ensemble furnished by Talman until Talman suspended enforcement of the career ensemble requirements of the grooming and dress code upon the ruling of the Court of Appeals.

30. Supp. App. 19.
31. Supp. App. 2-4.
32. P. App. 30.
33. P. App. 38-39; Supp. 12.
34. P. App. 29, 42-43.

Since suspension of enforcement of the career ensemble requirements, Talman has encountered greater problems about its women wearing unbusinesslike clothing although many of its women employees have voluntarily continued to wear career ensembles.

REASONS FOR GRANTING THE WRIT.

This Honorable Court should grant a Writ of Certiorari to review and reverse the judgment of the Court of Appeals because that court has promulgated a standard for sex discrimination under the Equal Employment Opportunity Act which makes illegal an employer's treatment of its employees without any actual adverse impact on any individual employee's employment opportunities, status, compensation, terms, conditions or privileges, despite earlier warnings by Mr. Justice (then Judge Stevens) that such a standard was not intended by Congress and is not the comparative standard of the Act. *Sprogis* v. *United Airlines, Inc.*, 444 F. 2d 1194, 1205-6 (7th Cir. 1971).

The Court of Appeals' holding based on this standard, is contrary to the holdings of seven other Circuits concerning employer's grooming and dress standards and will create confusion and uncertainty among those subject to and those enforcing the Act. That Court's holding has attracted widespread interest because many businesses have grooming and dress codes for employees especially in the financial, food and health care fields.

I.

THE COURT OF APPEALS PROMULGATED AN ERRONEOUS STANDARD FOR WHAT CONSTITUTES ILLEGAL SEX DISCRIMINATION.

The real grounds for the decision of the Court of Appeals are not easy to analyze because they are diffused through the

opinion, are not succinctly articulated, and are the result of the Court's own standards rather than the statute's standards. While the Court professes to rely on the statutory standards of Section 703(a)(1) of the Equal Employment Opportunity Act,[1] in fact the real basis for its decision is its own standard rather than the statutory standard specified by Congress.

Careful analysis of the Court's Opinion discloses that the basis for its decision is not the statutory standard of what is the actual objective impact of Talman's dress code requirements on the employment opportunities, benefits and enjoyment or conditions of employment of its female employees. Rather the Court's decision is based on its conclusion that Talman's dress code requirements are based on sexual stereotypes.

The Court's approach was early criticized by Mr. Justice (then Judge) Stevens when he was sitting in the Seventh Circuit. In his dissent in *Sprogis* v. *United Airlines Inc.*,[2] Mr. Justice Stevens pointed out the error of the standard which was adopted by the majority of the Seventh Circuit in that case. Mr. Justice Stevens noted that the majority opinion in *Sprogis* written by Judge Cummings (who also wrote the majority opinion in this case) adopted a test for discrimination that was not intended by Congress. That erroneous test was whether the employer's regulation was an irrational impediment derived

1. The Equal Employment Opportunity Act (constituting Title Vii of the Civil Rights Act of 1964) provides in Section 703(a)(1):

> a. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

2. 444 F. 2d 1194 (7th Cir. 1971).

from a stereotyped attitude toward females.[3] The same mistaken test was employed to decide this case.

In *Sprogis* Mr. Justice Stevens pointed out that the majority's test was in error because it did "not focus on the impact" of the employer's rule "on the employment opportunities of the members of one sex as opposed to the other".[4] In *Sprogis* as in this case, the majority purported to decide the case under Section 703(a)(1) rather than Section 703(a)(2) of Title VII. However, Mr. Justice Stevens pointed out that Section 703(a)(1) did not contain any guidelines for differentiating between "irrational stereotypes" and reasonable requirements.

The correct standard was pointed out in *Sprogis* by Mr. Justice Stevens who said:[5]

> ". . . In the long run, I believe justice will be served and the objectives of the legislation best accomplished by applying the simple comparative standard suggested by the language of the statute. The benefits of an objective standard will be shared by those enforcing the statute and those faced with problems of compliance."

The serious error in the standard for sex discrimination promulgated by the Court of Appeals is that the Court's standard does not focus, as the statutory language requires, on the actual impact, or effect, of the employment practice on the individual's compensation, terms, conditions or privileges of employment. Clearly Section 703(a)(1) specifies that for an employer's regulation to be illegal sex discrimination it must "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." In short, the regulation must have an adverse impact on the employee's "compensation, terms, conditions or privileges of employment" and be based on the individual's race, color, religion, sex or national origin.

3. 444 F. 2d at 1205.
4. 444 F. 2d at 1205.
5. 444 F. 2d at 1206.

In the *Sprogis* dissent Mr. Justice Stevens further pointed out that before an employer's rule or regulation can constitute even a prima facie case of discrimination it must have "differential impact on one of the classes of people protected by the Act."[6] As will be shown later in this Petition, Talman's clothing regulations clearly did not have such an impact on its female employees.

A. Congressional Intent as to What Constitutes Sex Discrimination.

Several courts have commented about the meager legislative history regarding the addition of "sex" discrimination to Section 703(a) and therefore the slim guidance for defining Congressional intent as to what constitutes sex discrimination. As was pointed out in *Willingham* v. *Macon Telegraph Publishing Company*,[7] the amendment adding "sex" was passed one day before the House of Representatives approved Title VII of the Civil Rights Act and nothing of import emerged from the limited floor discussions. The *Willingham* court concluded that based on the available evidence the intent of Congress was to guarantee equal job opportunities for males and females.

This Court has recognized that the intent of Congress in passing the Equal Employment Opportunity Act was to forbid only those differences in treatment of men and women which affect employment opportunities and erect employment barriers. The Congressional intent was described by This Court in the racial discrimination case of *Griggs* v. *Duke Power Company*,[8] as follows:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. *It was to achieve equality of employment opportunities and to remove*

6. 444 F. 2d at 1205.
7. 507 F. 2d 1084, 1090 (5th Cir. 1975).
8. 401 U. S. 424, 430-31, 91 S. Ct. 849, 953, 28 L. Ed 2d 158 (1971).

> *barriers* that have operated in the past to favor an identifiable group of white employees over other employees . . . (Emphasis supplied)

Congress clearly never intended the Equal Employment Opportunity Act to forbid merely different treatment of men and women by an employer which does not impair employment opportunties, benefits or enjoyments. This has been pointed out by the Ninth Circuit in *Baker* v. *California Land Title Company*,[9] which, after quoting This Court in *Griggs* said:

> Obviously, it seems to us, the court was not talking in terms of hairstyles or modes of dress for which the job applicant has complete control. The court was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter."

Other Courts of Appeals have had no difficulty in applying the statutory standard of Section 703(a) to mean that an employment practice, to be illegal, must result in some impairment of employment status, benefits or opportunities of the effected class or must in some way adversely impact their employment terms, conditions, compensation, or privileges.

B. The Courts of Appeal of Seven Other Circuits Have Upheld Different Grooming and Dress Standards for Men and Women.

The Courts of Appeals for seven other Circuits in passing on whether or not different grooming standards for men and women employees violate Title VII have concluded that reasonable differences in dress and grooming standards which have little or no effect on employment opportunities do not constitute sex discrimination. No Circuit, other than the Seventh Circuit in this case, has held to the contrary.

In *Knott* v. *Missouri Pacific Railroad Company*, 527 F. 2d 1249 (8th Cir. 1975) the railroad's grooming standards restricted hair length and style for male employees but no similar

9. 507 F. 2d 895, 897 (9th Cir. 1974).

regulations existed for female employees. The plaintiff, a male switchman, was suspended indefinitely for failure to comply with the standard. After reviewing the legislative history of Title VII and the holdings of other courts, the Eighth Circuit concluded (527 F. 2d at 1252):

> Defendant's hairlength requirement for male employees is part of a comprehensive personal grooming code applicable to all employees. While no hair length restriction is applicable to females, all employees must conform to certain standards of dress. Where, as here, such policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligable effect on employment opportunities. There is no claim that defendant has established its policy as a pretext to exclude males from employment.

The Eighth Circuit made clear that the statutory standard for what constitutes sex discrimination is whether difference in treatment of men and women causes employment disadvantages and not merely whether it is based upon sexual stereotypes when it said (527 F. 2d at 1251):

> The legislative history accompanying the passage of the 1972 amendments makes clear, however, that the primary trust of the provision was to discard outmoded sex stereotypes *posing distinct employment disadvantages for one sex*. (Emphasis supplied)

The *Knott* court then concluded that minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of Section 703(a) of the Equal Employment Opportunity Act.

Similar conclusions were reached in *Willingham* v. *Macon Telegraph Publishing Company*, 507 F. 2d 1084 (5th Cir. 1975) (refusal to hire a male solely because of objections to his hair length); *Fagan* v. *National Cash Register Company*, 481 F. 2d 1115 (Dist. Col. Cir. 1973) (male employee suspended because his hair did not conform to company require-

ments); *Dodge* v. *Giant Food, Inc.*, 488 F. 2d 1333 (Dist. Col. Cir. 1973), (food store employer's regulation against long hair on male employees with no similar restriction on women's hair length); *Baker* v. *California Land Title Company*, 507 F. 2d 895 (9th Cir. 1974) (male employee's refusal to conform to employer's hair length policy which tolerated long hair for females but not the same length for males); *Earwood* v. *Continental Southeastern Lines, Inc.*, 539 F. 2d 1349 (4th Cir. 1976) (hair length regulations covering male bus drivers); *Barker* v. *Taft Broadcasting Company*, 549 F. 2d 400, (6th Cir. 1977) and *Longo* v. *Carlisle DeCoppet & Co.*, 537 F. 2d 685 (2d Cir. 1976) (discharge of male employee because his hair length did not conform to a grooming code which mandated shorter hairlengths for men than for women).

That the cases on hair length and grooming were fully applicable to an employer's clothing regulations was recognized in *Fountain* v. *Safeway Stores, Inc.*, 555 F. 2d 753 (9th Cir. 1977). There a male employee alleged that his employer's dress regulation which required males to wear ties, but which did not impose the same requirement upon females violated Title VII, and therefore his discharge from employment for failure to comply with the regulation was illegal. Citing the grooming cases discussed above, the Ninth Circuit held that an employer may promulgate different personal appearance regulations for males and females and may enforce those regulations that it believes its particular business requires. Therefore, the employer's different clothing requirements for males was legal.

C. The Cases in the Other Circuits Are Not Distinguishable.

The Court of Appeals in the *Carroll* Case erroneously attempted to distinguish the cases on grooming and dress codes in the seven other Circuits by declaring that the instant case was brought under Section 703(a)(1) rather than Section 703 (a)(2). In fact, as careful analysis shows, all of the cases in the other Circuits were decided under *both* Sections 703(a)(1)

and (a)(2) or under Title VII as a whole, which of course includes both sections. The cases in the seven other Circuits are simply not distinguishable on such a ground. Hence fully applicable here are the conclusions of those cases that there must be an impairment of job opportunities, benefits, or enjoyment or some adverse impact on the terms, conditions, compensation or privileges of employment of individuals of one sex arising from a different treatment of men and women by an employer before there can be illegal sex discrimination.

To reach its erroneous conclusion to the contrary in the instant case, the Court of Appeals relied heavily on two other cases. The first such case was *Laffey* v. *Northwest Airlines Inc.*, 366 F. Supp. 763 (D. D. C. 1973), vacated and remanded in part and affirmed in part, 185 U. S. App. D. C. 322, 567 F. 2d 429 (1976), certiorari denied, 434 U. S. 1086, 98 S. Ct. 1281, 51 L. Ed. 2d 792. *Laffey* involved issues substantially broader than dress and grooming regulations. These issues included alleged discrimination in seniority, pay, and filling of job openings between male and female employees. The issue in *Laffey* most nearly comparable to the issue in the instant case involved the employer's rule that prohibited its female cabin attendants from wearing eye glasses. The District Court in *Laffey* held that this rule violated Section 703(a)(1) of the Act. That issue was not involved in the appeal in *Laffey* but, the Court of Appeals in the instant case speculated that had if it had been, the District Court's decision would have been affirmed. The Court of Appeals here did not explain why its speculation about what it believed the results would have been had that issue been appealed provided stronger precedent than the numerous actual decisions of the other Courts of Appeals, some en banc, on the validity of grooming and dress codes. (See citations *supra.*). The District Court here properly dismissed any such applicability of *Laffey* in a footnote.[10]

10. 448 F. Supp. at 82; App. A29.

The speculation of the Court of Appeals as to what the *Laffey* court might have decided had the eyeglass issue been presented on appeal is particularly unpersuasive because the Court of Appeals for the District of Columbia Circuit has twice upheld the lawfulness of different grooming regulations for men and women in *Dodge* v. *Giant Food, Inc.*, 488 F. 2d 1333 (1973) and in *Fagan* v. *National Cash Register Company*, 481 F. 2d 1115 (1973).

Furthermore, the employer's no eyeglasses rule is clearly distinguishable from Talman's grooming and dress code because the no eyeglasses rule would have resulted in depriving women who must wear them of any opportunity to be employed as stewardesses. Talman's dress requirements have no such effect, or in fact any actual adverse employment effect on women, as pointed out at length elsewhere in the petition.

In addition the Court of Appeals here relied heavily on the decision of this Court in *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U. S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978). The Court of Appeals ignored the fact, however that in *Manhart* and in the other sex discrimination cases decided by This Court under Section 703(a), the conclusions reached directly accord with whether or not significant adverse impacts occurred to the affected class from the employer's practice.

Thus in *Manhart* This Court held illegal the employer's practice of requiring female employees to pay more money into a pension fund than was required of male employees, with a resulting difference in take home pay between men and women. Likewise in *Nashville Gas Company* v. *Satty*, 434 U. S. 136, 98 S. Ct. 347, 54 L. Ed. 2d 356 (1977), This Court struck down an employer's practice which, though neutral on its face, in fact deprived women of substantial employment benefits and opportunities by stripping women of their seniority after taking a leave of absence when the same rule was not equally applied to male employees. In *General Electric Co.* v. *Gilbert*, 429

U. S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) This Court upheld an employer's disability plan which provided the same benefits to either sex but which did not include more extensive benefits (for pregnancy) which were peculiarly applicable only to certain persons of one sex.

II.

THE COURT OF APPEALS MISUNDERSTOOD AND INCORRECTLY INTERPRETED THE UNCONTROVERTED EVIDENCE.

In this case the undisputed evidence was that Talman does not utilize for either men or women different standards in making judgments on an employee's compensation, promotions, or performances. Except for Talman's requirements that each sex comply with Talman's dress code policy in a slightly different manner, there is no suggestion that Talman treats its male or its female employees in other than an individualistic manner.

The Court of Appeals, after deciding that Talman's grooming and dress code resulted in stereotyping of women, and, therefore, constituted illegal sex discrimination, nonetheless felt constrained to look for some adverse impact from the grooming and dress code upon the employment condition of Talman's female employees. The Court on the basis of its own subjective opinion concluded that Talman's dress requirements for women are "demeaning". In fact, no evidence whatsoever exists in the record that Talman's female employees have in fact been demeaned. The evidence is that the women employees overwhelmingly like the career ensembles.

No doubt the employees who objected to their employer's grooming and dress regulation in the cases passed on by the seven other Circuits disliked them and felt "demeaned", but that did not make those regulations impair the employee's employment opportunities, status, compensation, terms, conditions or privileges nor make the regulations illegal sex discrimination.

Additionally, the Court of Appeals erroneously concluded that Talman's female employees' compensation was adversely affected because Talman's female employees paid for the income tax benefit of the ensembles provided to them without cost by Talman; paid for the maintenance of the ensembles, additions to the ensembles, and the cleaning of the ensembles; and had to replace lost or damaged parts of the ensembles. This conclusion completely ignored the fact that male employees must do precisely the same thing with regard to their clothing. Clearly the Court of Appeals on this point is simply mistaken.

Talman's dress and grooming code does not in any way reduce employment opportunities for women or adversely impact their employment status. Certainly the career ensemble requirements of the dress and grooming code do not deny any female employee the possibility of employment. No jobs are barred to them because of it. No contrary claim has ever been made. In fact, 78.5% of Talman's tellers and office and managerial employees are women (528 of 673 employees). Clearly the dress and grooming code has not restricted employment possibilities for women. There has been no claim that the dress and grooming code is a mere pretext or intended to limit employment for women. It of course does not have any such effect.

Furthermore the grooming and dress code does not affect the other aspects of women employment status (i.e. the benefits of their employment). It does not reduce their compensation in any way. Nor does it restrict their employment mobility. It does not impair in any way the opportunities, privileges or other benefits of employment such as seniority, retirement, insurance, sick leave and promotion.

A. The Actual Nature of the Clothing Requirements of the Grooming and Dress Code.

Talman permits its female employees wide latitude in the effecting of the grooming and dress code requirements. The clothing required by women consists of each individual women's choice of items from eight basic color-coordinated items: a skirt or slacks and a jacket, or a blazer or a tunic. The jackets, blazers and tunics may have long or short sleeves. The ensembles change with the season and from year to year in color and pattern. They are selected by a committee of six female employees chosen to provide a cross-section of all women employees as to managerial or staff, job function, age and clothing size. All women employees are encouraged to make suggestions to the committee. Talman's management exercises little, if any, supervisory control over the committee except to require that the committee's selection of the apparel present a reasonable business-like appearance. Talman does not dictate which items of the ensemble any women should wear or which should be worn at any given time. Such matters are left entirely to the discretion of its women employees. Additionally, the women employees wear blouses, scarfs, shoes, hosiery and other accessory items of their individual choices. The ensemble items do not contain any identification with Talman in any manner and are as suitable for general street wear as any other clothing.

Despite the actual varied nature of the clothing worn by the women, Respondent Carroll argued that Talman's dress requirements for women is a "uniform policy", a subjective, self-serving characterization which the Court of Appeals accepted (604 F. 2d at 1029) despite the evidence otherwise. The implication of this characterization is that Talman's grooming and dress code thoroughly regiments its women employees' clothing and required it to be entirely the same whereas its male employees' clothing is not. No evidence exists to support such a conclusion; in fact the undisputed evidence is to the contrary.

As the District Judge noted,[11] and as Judge Pell accurately observed in his dissent in the Court of Appeals,[12] Talman's policy applies equally to male and female employees and only on the surface does it appear more restrictive as to females. In fact, Talman's dress and grooming code results in no more standardized women's clothing than do its requirements for men's clothing. As Judge Pell pointed out at length in his dissent, the similarity of men's clothing makes the clothing that the men employees are required to wear no more, or even less, diversified than the clothing which the women wear.

III.

THE COURT OF APPEALS DECISION IS BAD JUDICIAL LEGISLATION AND BAD POLICY.

Talman's grooming and dress code was adopted for a number of legitimate business reasons. It is obvious that neat, clean personnel in business-like attire is an important part of the public "image" of an organization.

Efficient, courteous, business-like service to the public has long been a primary and an effective competitive tool of Talman. It is important to Talman because its competitors, other savings and loan associations and financial institutions, offer nearly identical savings accounts and loans. In Talman's judgment, its grooming and dress code is an important competitive measure because its requirements assure that its employees maintain an appropriate business-like appearance. The career ensemble requirements are an important part of this code.

Furthermore, the women's career ensembles contribute to Talman's good relations with its customers and employees. The customers like them and comment favorably about them. Experience has shown that the career ensembles improve relations

11. 448 F. Supp. at 83; App. A30.
12. 604 F. 2d at 1037; App. A20.

with Talman's women employees because they reduce supervisors' controversies with women employees over whether their attire is appropriate and businesslike. Women employees overwhelmingly favor the career ensembles. In fact, the career ensembles were adopted at the request of the women and enable them to save money on their clothing for work. The Respondent's objection to them is only the subjective opinion of one part-time employee.

All of these reasons are valid job-related reasons for Talman's grooming and dress code and particularly the career ensemble portion of it. They are not only legitimate reasons, but they are also the real reasons Talman has made the career ensembles part of its grooming and dress code and continued to support it.

The Court of Appeals brushed aside these facts, stating that it was the compulsion to wear a uniform which by its color, cut and homogeneity is clearly identifiable with the employer that evinces the discriminatory nature of the written dress code for females. (604 F. 2d at 1030). The Court ignored the equivalent compulsion on Talman's males employees to wear either a business suit or business-type sport jacket and pants plus a tie. Doubtless some of them would prefer to wear other types of clothing and object to that compulsion and feel regimented by it. The Court also ignored the fact that once a Talman female employee leaves her place of employment, the career ensemble is clearly not identifiable with Talman. In fact many of them wear the career ensembles for other occasions than their work.

In striking down Talman's dress code regulations the Court in effect held that Congress intended to interfere with the business judgment of private employers as to how employees should dress while representing an employer and engaged in its business even when the employer's dress requirements in question had no adverse impact on individuals or a class of employees and did not result in lost or impaired employment

opportunities for members of the affected class. The Court in brushing aside one of Talman's business practices, which has devolved from its long standing experience, did so with the suggestion that the Talman was free to follow several judicially suggested, but untried, alternative means which, the Court felt, would serve Talman's purposes. (604 F. 2d at 1033).

The dangers in courts' compelling businesses to adopt practices the courts consider more appropriate than those adopted by management has been pointed out by Mr. Justice Rehnquist in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 578, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). That case involved a contractor's practices which allegedly discriminated against blacks in hiring bricklayers for critical brick work in steel furnaces.

The issue before this Court was whether the Court of Appeals for the Seventh Circuit had gone too far in substituting its judgment as to hiring practices to be used by an employer. On this point, This Court said:

> The danger of embarking on a course such as that chartered by the Court of Appeals here, where the Court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals critized as deficient for exactly those reasons. *Courts are generally less competent than employers to restructure business practices, and unless mandated mandated to do so by Congress they should not attempt it.* (Emphasis supplied)

Such an observation is entirely applicable to the assumption of the Court of Appeals in this case that Talman could have made other clothing regulations which, the Court of Appeals felt (despite its lack of expertise in Talman's business), would have served Talman's business purposes just as well. One of

these is already occasionally employed by Talman (on glamour days) and has been found less satisfactory and to result in more problems in personnel relations and with customers.

CONCLUSION.

The Court of Appeals wrongly promulgated a subjective standard of when an employer's employment regulations constitute illegal sex discrimination. The Court's standard ignores the actual impact of the employer's employment practices on individual employees and the explicit requirements of the Equal Employment Opportunity Act that there be adverse effect on individuals of one sex. In doing so, the Court ignored the numerous precedents in the Supreme Court and other courts that have required such impact for illegal sex discrimination.

The Court also ignored that its holding conflicted with those of all seven other Circuits which have passed on substantially equivalent grooming and dress requirements of an employer. Further, the Court of Appeals totally misapprehended the undisputed evidence in this case so as to justify the Court's application of its erroneous standard.

The Court of Appeals' standard produces a vague and indefinite basis for determining when an employer's regulations constitute illegal sex discrimination. As a result, compliance with and enforcement of sex discrimination prohibitions have been made difficult and uncertain.

Wherefore, the Supreme Court should issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review the judgment and order of that court.

Respectfully submitted,

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APPENDIX A

604 F. 2d 1028 (1979)

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1458

MARY M. CARROLL, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 1729—Joel M. Flaum, Judge

ARGUED DECEMBER 6, 1978—DECIDED AUGUST 21, 1979

Michael T. Welch, Winston & Strawn, Chicago, Ill., for plaintiff-appellant.

Robert A. Deane, Chicago, Ill., for defendant-appellee.

Before CASTLE, *Senior Circuit Judge*, CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.*

Plaintiff's amended complaint was brought under Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*) on

behalf of herself and all similarly situated female employees of defendant savings and loan association. The gravamen of the complaint was that defendant imposed a dress code on its female office employees without imposing a comparable dress code on its male office employees. Plaintiff moved for certification of her class and both parties moved for summary judgment. The district court did not certify a class because it granted the defendant's motion for summary judgment on the ground that its female dress code does "not prevent employment opportunity" under Section 703(a)(2) of Title VII (note 12 *infra*). 448 F. Supp. 79, 83. Since this case was based on Section 703(a)(1) (note 2 *infra*) rather than Section 703(a)(2), the employment opportunity test used by the district court was erroneous and requires us to reverse and remand.

Defendant requires all of its female tellers, office and managerial employees to wear a uniform, whereas male employees in the same positions need wear only customary business attire. This may consist of a suit, a sport jacket and pants, or even a "leisure suit," as long as it is worn with a shirt and tie. It is of course understandable that defendant wishes its employees to wear suitable business attire. However, the question before us is whether its one-sided rule requiring its 525 female employees to wear uniforms while there is no such requirement for its comparable 150 male employees[1] is forbidden by Section 703(a)(1) of Title VII of the Civil Rights Act of 1964.[2] By this rule defendant discriminated against plaintiff with respect to her "compensation, terms, conditions, or privileges of employment" because of her sex although such conduct is proscribed by the literal terms of that Section.

1. These 675 employees are tellers, officers and managerial personnel.

2. Section 703(a)(1) provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *." (42 U. S. C. § 2000e-2(a)(1).)

When the Equal Employment Opportunity Commission investigated plaintiff's complaint, it concluded that defendant's female dress policy constituted a "disparity in the terms and conditions of females as a class" and that possible customer preference for uniforms was "not a defense to an employment policy which makes a distinction upon grounds not permitted by Title VII" (P. App. 19). Therefore, the Commission tried to settle the matter and, when unsuccessful, issued a right-to-sue letter to plaintiff (P. App. 20), thus enabling this lawsuit to be filed.

The district court noted that the uniforms that females must wear consist of five basic items: a color-coordinated skirt or slacks and a choice of a jacket, tunic or vest (P. App. 94). As the reproduced photograph shows,[3] there is no question that the various combinations depict uniforms.

3. The photograph is Exhibit I to defendant's Memorandum on Summary Judgment and is reproduced on page 1 of defendant's Supplemental Appendix.

In contrast to the written uniform requirement for women employees, comparable male employees are permitted to wear business suits or business-type sport jackets and pants and ties (P. App. 21), and they are also permitted to wear leisure suits with a "suitable shirt and tie" (P. App. 36). Until 1968 they too were required to wear uniforms (P. App. 32).

The written dress code for female employees even discriminates with respect to their compensation, for defendant treats the cost of the two-piece uniform which it furnishes as income to women employees, withholding income tax on that amount from their wages (P. App. 91). In addition, the female employees are required to pay for the cleaning and maintenance of

their uniforms "which must be clean and neat at all times" (P. App. 22). If a part of the uniform becomes lost or damaged, the employee must replace it at her own expense. Moreover, if an employee wishes additional parts of the uniform for variety or so that it can be cleaned more frequently than once a month, these extra pieces must also be purchased at her own expense. The written dress code for females also discriminates against them with respect to the "terms, conditions, or privileges of employment" because they are required to wear these uniforms each working day except the last Tuesday of each month, when they are normally being cleaned, and during the week between Christmas and New Year's (P. App. 21, 67, 94). As in plaintiff's case, defendant suspends employees if they do not conform to the dress code (P. App. 25).

Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D. D. C. 1973), vacated and remanded in part and affirmed in part, 185 U. S. App. D. C. 322, 567 F. 2d 429 (1976), certiorari denied, 434 U. S. 1086, 98 S. Ct. 1281, 55 L. Ed. 2d 792, sets the stage for the proper disposition of this dispute. There the district court held that an airline's ruling forbidding female cabin attendants to wear eyeglasses violated Section 703 (a)(1) of Title VII (366 F. Supp. 763, 790), and the airline did not appeal from that aspect of this decision. See 567 F. 2d at 454, n. 170. However, the court of appeals affirmed the district court's comparable holding that inferior pay scales and weight limitations imposed upon stewardesses as compared to stewards (then known as pursers) violated Title VII. Because of this holding the court of appeals obviously would have agreed with the district court's rulings that the airline had violated the stewardesses' statutory rights by prohibiting them from wearing eyeglasses, requiring them to purchase prescribed luggage, and imposing on them a shorter height limitation than on stewards.[4]

4. In *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 708, 98 S. Ct. 1370, 55 L. Ed. 2d 657, a similar height limitation was condemned under Section 703(a)(1).

The dissenting opinion of Judge Pell characterizes both the male and female dress codes as resulting in ordinary business attire and concludes that the two rules are only semantically different. However, it is the compulsion to wear a uniform which by its color, cut and homogeneity is clearly identifiable with the employer that evinces the discriminatory nature of the written dress code for females.[5] The dissent relies on the fact that the female uniforms are not "unattractive in style, inferior in quality, ill-fitting, or uncomfortable such that they would cause embarrassment or be considered demeaning," but that is no answer to the discrimination involved.[6] Finally, the dissent relies on the fact that the female dress code "did not *substantially burden* the female employees more than male employees in the enjoyment of their jobs" (emphasis supplied), but that is not the criterion imposed in Section 703(a)(1) of the Act, for that Section was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis* v. *United Air Lines,* 444 F. 2d 1194, 1198 (7th Cir. 1971), certiorari denied, 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543.[7] Also, it is immaterial that some of the female employees favored the uniform dress code because, as Justice Stevens stated in *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U. S. 702, 707, 98 S. Ct. 1370, 55 L. Ed. 2d 657, Section 703(a)(1) makes it unlawful to discriminate against any individual because of such individual's sex. He added:

> "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of

5. As we point out *infra,* the employer had numerous alternative means of assuring that all its employees wear business-like apparel that would not contravene Title VII.

6. We do not think the personal taste of this Court is relevant to the rights involved in this appeal, but are quite certain that there is room for differences of opinion on the sartorial excellence of the uniforms.

7. This pasage was quoted with approval in *Los Angeles Dept. of Water & Power* v. *Manhart,* 435 U. S. 702, 707, n. 13, 98 C. Ct. 1370, 55 L. Ed. 2d 657.

> a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.
>
> * * * * *
>
> "Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." (435 U. S. at 708, 709, 98 S. Ct. at 1375-1376.)[8]

Section 703(c) of the statute permits sex discrimination in employment where sex "is a bona fide occupational qualification reasonably necessary to the normal operation" of the particular business (42 U. S. C. § 2000e-2(e)). However, defendant does not rely on a "BFOQ" defense nor does defendant rely on any business necessity for this dress code (Br. 53-54). Instead its defense is that its dress code, if discriminatory, was job-related or reasonably necessary to the proper operation of its business (Br. 55, 57). But the courts have only permitted a stricter "business necessity doctrine" as an exception to Title VII,[9] and defendant has not attempted to justify the female dress code on the ground of business necessity (Br. 46-57).

8. Other cases showing that even though many of the women employees like the uniforms, that is no defense to a violation of Section 703(a)(1) include *Diaz* v. *Pan Am World Airways, Inc.,* 442 F. 2d 385, 389 (5th Cir. 1971); *Sprogis* v. *United Air Lines, Inc.,* 444 F. 2d 1194; 1199 (7th Cir. 1970), certiorari denied, 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543; *Doe* v. *Osteopathic Hospital of Wichita Inc.,* 333 F. Supp. 1357, 1362 (D. Kan. 1971). The reference to "enjoyment" in *Sprogis* relied upon in the dissent was to job enjoyment rather than any satisfaction that defendant's employees might derive from their clothing. See 444 F. 2d 1194, 1198.

9. See, *e.g., United States* v. *St. Louis-San Francisco Railway Co.,* 464 F. 2d 301, 308 (8th Cir. 1972), certiorari denied, 409 U. S. 1107, 93 S. Ct. 900, 34 L. Ed. 2d 687; *Sagers* v. *Yellow Freight System, Inc.,* 529 F. 2d 721 (5th Cir. 1971); *United States* v. *Bethlehem Steel Corp.,* 446 F. 2d 652, 662 (2d Cir. 1971).

As plaintiff has pointed out, defendant has several permissible alternatives to the present discriminatory dress code. Thus it could legitimately require women to wear "appropriate business attire" while at work, as in the case of the men employees,[10] or it could make the uniform optional to women employees.[11] Otherwise it could require comparable male employees to wear some sort of uniform while at work, as they did between 1958 and 1969, and as numerous other banks and savings institutions do. Title VII does not require that uniforms be abolished but that defendant's similarly situated employees be treated in an equal manner.

The employment opportunity grooming cases relied upon in the dissent and by defendant do not apply to the present situation, for this is a Section 703(a)(1) case rather than one brought under Section 703(a)(2)[12] which alone requires deprivation of employment opportunities in order for a classification based on sex or another prohibited basis to be held illegal.[13]

10. It would not be offensive, for example, if the employer required its female employees to wear business-like skirts or pants and a vest or jacket.

11. If the dissent is correct that the response to the uniforms has been "positively favorable," one would expect little effect on the employer's dress code in making the uniforms optional.

12. Section 703(a)(2) provides:

> "(a) It shall be unlawful employment practice for an employer—
>
> * * * * *
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U. S. C. § 2000e-2(a)(2).)

13. Defendant insists that sex discrimination must involve a deprivation of opportunity for employment or of the benefits of employment in order to violate Section 703(a)(1) (*supra* note 2). However, that Section proscribes discrimination with respect to terms and conditions of employment, as well as compensation and

(Footnote continued on next page.)

Nashville Gas Co. v. *Satty*, 434 U. S. 136, 144-145, 98 S. Ct. 347, 54 L. Ed. 2d 356.

Fountain v. *Safeway Stores, Inc.*, 555 F. 2d 753 (9th Cir. 1977), relied upon by the district court (448 F. Supp. 79, 81), found no violation of Title VII in Safeway's requirement that male employees wear a tie, but in *Fountain* the court merely held that "Safeway may promulgate different personal appearance regulations for males and females * * *" (55 F. 2d at 756). Similarly, in *Fagan* v. *National Cash Register Co.*, 157 U. S. App. D. C. 15, 481 F. 2d 1115 (1973), also relied upon by the district court, an employer's rule regulating hair length for men was held to be non-discriminatory.[14] The *Fagan* court commented

> "reasonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination 'because of sex'" (157 U. S. App. D. C. at 17, 481 F. 2d at 1117, n. 3.)

(Footnote continued from preceding page.)

privileges. Other courts have recognized that personal appearance regulations that treat male and female employees differently are proscribed by Section 703(a)(1) at least where, as here, they cannot be justified as reasonably related to the employer's business needs. *Roberts* v. *General Mills, Inc.*, 337 F. Supp. 1055 (N. D. Ohio 1971); *Donohue* v. *Shoe Corporation of America*, 337 F. Supp. 1357 C. D. Cal. 1972); *Aros* v. *McDonnell Douglas Corporation*, 348 F. Supp. 661 (C. D. Cal. 1972); *Rafford* v. *Randle Eastern Ambulance Service, Inc.*, 348 F. Supp. 316 (S. D. Fla. 1972).

14. In *Fagan*, the hair-length rule applied only to service representatives, whose jobs took them to the permises of customers during business hours. Although the plaintiff argued primarily that the regulation unconstitutionally invaded his privacy interests, he also suggested that the regulation constituted sex discrimination. However, apart from the fact that the regulation reflected social norms and was reasonable, there were no women service representatives in comparison to whom the plaintiff could even arguably have been treated disadvantageously.

We share the reluctance of the courts in *Fountain* and *Fagan* to pass on whether a particular personal appearance regulation promulgated by an employer is "reasonable." So long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women.[15] However, the situation is different where, as here, two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes—one including a variety of normal business attire and the other requiring a clearly identifiable uniform. This different treatment in the conditions of employment for female employees cannot be justified by business necessity, since, as already described, the employer had a variety of non-discriminatory alternative means of assuring good grooming. Moreover, the disparate treatment is demeaning to women. While there is nothing offensive about uniforms *per se*, when some employees are uniformed and others not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes. The employer's stated justification for the policy is that

> "dress competition among women is reduced and they do not have to be concerned about wearing something that is

15. The other two cases on which the district court relied, *Jarrell* v. *Eastern Air Lines*, 430 F. Supp. 884 (E. D. Va. 1977), and *In re National Airlines, Inc.*, 434 F. Supp. 269 (S. D. Fla. 1977), upheld weight limitations imposed on flight attendants as part of the employer's personal appearance regulations. In both cases, however, the courts undertook a careful analysis of the weight limitation rules and how they were applied to both male and female employees. Each court concluded that the rules at issue, unlike those in *Laffey* v. *Northwest Airlines, Inc., supra*, did not discriminate on the basis of sex. The two cases are thus consistent both with *Laffey* and with our conclusion in this case, since a factual determination of whether the rule was discriminatory in application would have been unnecessary if employees' rights under Title VII were as limited as defendant contends.

> appropriate business attire because the career ensemble[16] is acceptable. [D]ress competition exists among women employees on glamour days [b]ut in the case of men employees there is little difficulty getting them to adhere to the dress and grooming code requirements. And there is little dress competition among male employees * * *." (Br. 5-7.)

Furthermore, counsel for defendant commented at oral argument that although the defendant trusts the business judgment of its female employees,

> "the selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm * * * problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit skirt fashion which is currently prevalent * * *. They tend to follow those [fashions] and they don't seem to equate that with a matter of business judgment."

Clearly these justifications for the rule reveal that it is based on offensive stereotypes prohibited by Title VII. As Judge Pell wrote for this Court in *In re Consolidated Pretrial Proceedings in the Airlines Cases*, 582 F. 2d 1142 (7th Cir. 1978), the proffered justification

> "relies heavily on stereotypical assumptions, a posture which is anathema to the maturing state of Title VII analysis.
>
> * * * * *
>
> "[A]ssumptions steeped in cultural stereotypes * * * are inconsistent with the purposes of the Act." (582 F. 2d at 1146-1147).[17]

16. The defendant refers to the clothing at issue here as a "career ensemble" rather than a uniform, but that euphemism does not alter our analysis. Days on which female employees are exempted from the requirement of wearing the uniform are referred to by the defendant as "glamour days."

17. Contrary to the implication in the dissent, our previous discussion of other cases involving appearance regulations clearly shows

(Footnote continued on next page.)

It should be noted that when plaintiff did not wear the uniform, the district court found that she appeared at work "dressed in appropriate business attire" (P. App. 96). Moreover, defendant's personnel manager admitted that during the times they were not required to wear uniforms, namely on the last Tuesday of every month and during Christmas week, these female employees never wore "improper business attire" (P. App. 82-83).

With all due respect to the views of a valued colleague, Judge Pell's dissenting opinion favors affirmance mainly because the sex discrimination here is not blatant. However, Section 703 (a)(1) prohibits any sex discrimination with respect to compensation, terms, conditions, or privileges of employment (note 2 *supra*). Hence we reverse the judgment below and remand for class determination and entry of summary judgment for plaintiff, affording her whatever relief the district court considers appropriate after careful consideration of her six relief prayers (P. App. 11-13).

Reversed and remanded with directions.

PELL, *Circuit Judge*, dissenting.

With this decision of this court, Big Brother—or perhaps in this case, Big Sister—has encroached, in my opinion, father than the Congress intended or authorized into the domain of private enterprise, or what remains of that concept, not for the purpose of assuring clean or safe, or even enjoyable, working conditions on an equality of sex basis, nor for the purpose of guaranteeing fair, adequate or equal compensation, but simply to respond to the emotional complaint of one disgruntled employee who purported to claim, without any support in the

(Footnote continued from preceding page.)

that we do not view the recognition of different dress norms for males and females to be offensive or illegal stereotyping. What is offensive is the compulsion to wear employer-identified uniforms and the assumption on which the employer openly admits that rule is based: that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can.

record, that she represented the thinking of a class of employees. I therefore respectfully dissent.

The majority opinion categorizes the clothing women are required to wear at work as uniforms but refers to that which men must wear as customary business attire. These characterizations ignore the fact of life that men's customary business attire has never really advanced beyond the status of being a uniform. True there have been variations from time to time probably mainly attributable to the desire of the clothiers to stay in business—there have been wide and narrow lapels, cuffed and cuffless trousers, different colored shirts which are ordinarily substantially covered by jackets, some splashes of color in neckties, a choice of four-in-hands or bowties, non-vested and vested suits,[1] a choice of belted or beltless or suspender-supported trousers, ankle-length or over-the-calf hosiery, pleated and non-pleated trousers, three button or two button jackets and even occasionally in daring moments a pleated-back jacket. In the most innovative soaring from the nest of uniformity that I can recall in recent decades someone introduced the so-called leisure suit which upon any fair analysis itself resembles a uniform. Men, of course, do have a choice of materials and colors in their suit, or sport jacket and slacks outfits, but I am not aware that lurid colors would qualify as "customary business attire," any more than would one of the bizarre assemblages worn by a modern rock singer.

On the other hand, women have had a wide range of non-uniformity, of recent vintage being the slit skirt and a few years earlier the mini which often barely qualified as a skirt. High boots have alternated with spike heels and sandals. The dresses, or blouses and skirts which are not covered by outer jackets as in the situation of men, are multi-colored and multi-patterned.

1. Men are so unfortunately locked in to these narrow style changes that now they frequently are unable to purchase a tropical weight suit without a restrictive vest which is a ludicrous third piece in a summer which marks perhaps the end of a synonymity between air conditioning and coolness.

Women frequently now wear slacks, an accoutrement in previous years regarded as being the exclusive province of the male.

In sum, customary business attire for the men employees of Talman seems to me to confine these employees in a uniform to the same extent as the Talman dress code does for women, in each case in reality not so much for the purpose of requiring a uniform but for the purpose of achieving a uniformity of business-like attire. One only has to observe people on the way to business jobs on the sidewalks of Chicago to be aware of the essential uniformity of male garb and the lack of that uniformity among women.

I recognize that the favorite putting-down remark that is resorted to when anyone is so bold as to delineate actual factual differences between men and women—in this case, the clothing that they customarily wear—is to accuse the person of indulging in stereotyping. If what I have written about the difference of clothing styles between the sexes be stereotyping, I will borrow an oft-quoted phrase from one of our forebears who, I believe, would be aghast at the extent of omnipresent governmental intrusion in our daily affairs, and simply say, "Make the most of it."

The plaintiff argues that the defendant's career ensemble requirement for female employees without an identical requirement for male employees violates § 703(a) of the Act which provides that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U. S. C. § 2000e-2(a).

I agree with the district court that this is a case of first impression. The question here, it seems to me, is whether an employer violates Title VII by enforcing a dress code which is applicable to both men and women but which is only on the surface restrictive as to women. After a thorough analysis of the case law relevant to this issue, the district court concluded that the defendant's dress code did not prevent employment opportunities and thus did not violate Title VII.

The majority opinion makes much of the fact that the district court focused on "employment opportunities" and not on "conditions of employment." It is true that the Congress put these two aspects into two separate statutory subparagraphs but I regard this out-of-any-abundance-of-caution separation as creating a distinction without a real difference. If what Talman required of its women employees did not limit them in a way which tended to deprive them of employment opportunities or otherwise adversely affect their status as an employee, I cannot conceive that there was discrimination as to conditions of their employment. The difference, if it exists, is purely semantical.

There really being no fundamental difference in impact, insofar as the present factual context is concerned, I regard it as unimportant that some judicial opinions have addressed the broader and all-encompassing "employment opportunities" and its accompanying prohibition against an adverse effect on status as an employee. The cases do make it clear that "regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within the meaning of Title VII." *Fountain* v. *Safeway Stores, Inc.*, 555 F. 2d 753, 755 (9th Cir. 1977). *Accord Barker* v. *Taft Broadcasting Co.*, 549 F. 2d 400, 401 (6th Cir. 1977); *Earwood* v. *Continental South-*

eastern Lines, Inc., 539 F. 2d 1349, 1351 (4th Cir. 1976); *Longo* v. *Carlisle DeCoppet & Co.*, 537 F. 2d 685 (2d Cir. 1976); *Knott* v. *Missouri Pac. Ry. Co.*, 527 F. 2d 1249, 1252 (8th Cir. 1975); *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F. 2d 1084, 1092 (5th Cir. 1975) (*en banc*); *Dodge* v. *Giant Food, Inc.*, 160 U. S. App. D. C. 9, 13, 488 F. 2d 1333, 1337 (1973).

In many of the cases the courts have not distinguished between § 703(a)(1) and § 703(a)(2). The plaintiffs have claimed a violation of § 703(a) and the courts have merely discussed whether the conduct constitutes sex discrimination within the meaning of § 703(a). Thus in *Fountain*, the litigation involved a discharge of the plaintiff for failure to wear a tie during working hours. Female employees did not have to wear ties. The employer had in the past amended its dress code to some extent in response to complaints from employees, but it refused to eliminate its necktie requirement. The court, without reference to a specific subsection of § 703, held that this dress code did not constitute sex discrimination under Title VII. In response to an allegation that the company responded to male and female complaints in a discriminatory manner (apparently accommodating females more readily than males), the court stated that the company's reactions to different protests merely indicated an effort to maintain dress and grooming regulations that are not overly burdensome to its employees yet still serve to extend an image to its customers which it believed was beneficial to its business. "This power to amend regulations for one sex independent of any action with respect to the regulations for the other sex flows directly from the employer's power to promulgate separate regulations in the first place." *Id.* at 756.

In *Barker* v. *Taft Broadcasting Co.*, 549 F. 2d 400 (6th Cir. 1977), the plaintiff was discharged because of his hair length pursuant to a grooming code which mandated shorter hair length for men than for women. Indeed, the women's code apparently did not restrict length at all, but limited only the manner in which their hair could be styled. The court concluded that the complaint, which apparently did not specify a subsection of § 703, did not state a claim. Although the majority opinion does not mention a specific subsection of § 703, the dissent by Judge McCree says that the majority opinion was based on § 703(a)(1). The dissent, however, does not then articulate any difference between the two subsections. The majority's reasoning was that: "Employer grooming codes requiring different hair lengths for men and women bear such a negligible relation to the purposes of Title VII that we cannot conclude they were a target of the Act." *Id.* at 401.

In *Knott* v. *Missouri Pacific Railroad Co.*, 527 F. 2d 1249 (8th Cir. 1975), the plaintiffs were discharged for not complying with the employer's hair length regulation which applied only to male employees. The employer had no similar regulation restricting the hair length or hair style of female employees. The court quoted both subsections of § 703(a) but did not discuss them separately. In reviewing the little legislative history that exists, it stated that "the legislative history accompanying passage of the 1972 amendments makes clear, however, that the primary thrust of the provision was to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex." *Id.* at 1251. The court summarized the case law as concluding that the Act "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers." *Id.* at 1251-52. In reaching its holding that "minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of [§ 703(a)]," it stated that "[w]here, as here, such policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities." *Id.*

Other courts, however, without particular recognition that they were focusing on either subsection did refer to the "em-

ployment opportunity" theory. In *Dodge*, for example, different hair-length requirements for male and female employees were held valid under Title VII on the theory that Title VII was not "intended to invalidate grooming regulations which have no significant effect upon the employment opportunities afforded one sex in favor of the other." 160 U S. App. D. C. at 13, 488 F. 2d at 1337.

Similarly, in *Willingham* the Fifth Circuit, sitting *en banc*, upheld an employer's sex-differentiated hair length regulation and adopted the view that sex discrimination on the basis of something other than immutable characteristics or the exercise of constitutionally or statutorily protected rights does not inhibit employment opportunity in violation of Title VII. 507 F. 2d at 1191-92. The Fourth Circuit followed this reasoning in *Earwood* to uphold a similar hair-length regulation. The majority in *Earwood* specifically distinguished between discrimination based on factors of personal preference (e. g. hair length or mode of dress) and discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing. 539 F. 2d at 1351.[2]

Even if we extended the scope of Title VII beyond the exercise of fundamental rights or one's possession of certain immutable characteristics as urged in the dissent in *Earwood*, I think we should go no farther than to adopt an equitable analysis, and one which appears to me to reflect Congressional intent more accurately, and makes cognizable under § 703(a) discrimination based on any factor which substantially burdens employment opportunities or *enjoyment* for the employees of one sex. This approach follows from and is consistent with this court's broad view of Title VII expressed in *Sprogis* v. *United Air Lines*, 444 F. 2d 1194, 1198 (7th Cir. 1971), that "Sec-

2. The cases to which I have referred all involve discrimination complaints by male employees. I do not conceive that either the plaintiff or the majority opinion takes the position that there should be a difference of standard dependent upon the sex of the complainant.

tion 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and *enjoyment* which have plagued women in the past." (Emphasis added.)

It appears to me in the interest of accomplishing the Congressional objective rather than engaging in semantical hair-splitting as to the differences between employment opportunities and employment conditions that any issues presented under § 703(a) could be better analyzed from the point of view of whether the claimed discrimination inhibits one sex more than the other in the enjoyment of their jobs. In the present case this would require a determination of whether the on-the-surface sex-differentiated dress standards substantially burden female employees' enjoyment of their jobs more than that of male employees. In essence it appears clear to me in this case that both groups are required to conform to a status of wearing customary business attire.[3]

Looking once more at what Talman's female dress code specifically involves, it is clear that it is not strait-jacketing but does offer substantial variety, all of which nevertheless is designed to create a businesslike rather than a fashion fair atmosphere. The variety permits slacks or one of three different skirts to be combined with either a jacket, tunic, or vest. With this two-piece outfit the woman may wear a variety of other clothing substantially of her own choosing, including blouses, sweaters, scarves, hosiery, and shoes. She also may wear any combination of her choosing each day. The variety of apparel available to female employees within the career ensemble regulations militates against finding a substantial burden on enjoyment of their jobs vis-a-vis male employees. Accordingly, a decision affirming the district court would not render all sex-differentiated dress codes impervious to Title VII scrutiny. We do not here have a

3. The dress code in the present case does not restrict employment possibilities for women. No jobs or promotions are barred to women because of it. Moreover, the plaintiff does not claim that the dress code is a mere pretext intended to limit employment for women.

case presenting a policy which requires females to wear only a specific uniform with less individual discretion to choose accompanying items of clothing, and which gives males broad discretion in choosing their work attire. When such a case is presented it will then be appropriate to determine whether the policy would burden females in the enjoyment of their jobs sufficiently to violate Title VII.

A second factor in the present case is that the career ensembles women are required to wear are not unattractive in style, inferior in quality, ill-fitting, or uncomfortable such that they would cause embarrassment or be considered demeaning.[4] A female employee wearing a career ensemble would not appear less well-dressed than a male employee dressed according to the regulations applicable to him. As I stated at the outset of this dissent the dress standards applied to both men and women result in ordinary business attire although the rules are semantically different. This difference in form, although not in substance, is not sufficient to constitute a substantial burden for females in the enjoyment of their jobs. Again, we would have a quite different case if, for example, the female employees of a savings and loan association were required to wear dehumanizing or uncomfortable clothing, or drab unstylish outfits, or any other attire which by the acceptable female dress norms of the time would be considered as embarrassing or demeaning to the wearer while male employees were only required to wear conventional business suits. Indeed, it is again to be noted that the Talman policy does not require distinctively female attire such as skirts only, slacks being permitted.

A further factor contributing to my conclusion that the dress code in this case did not substantially burden female employees more than male employees in the enjoyment of their jobs is that there has been no particular oblatration, if indeed any complaint at all, by female employees about the dress code, and in

4. See the discussion hereinafter on how the employees themselves select the style of the ensembles.

fact, the response has for years been positively favorable. The lack of complaint and generally positive response by female employees to the career ensemble program may well be due to the process by which the career ensemble is selected. A Career Ensemble Committee consists of six women employees chosen to provide a cross-section as to age, clothing size, job functions, and level in the corporate hierarchy. This committee selects the style, color, and supplier of the career ensemble. All female employees can make comments and suggestions to the committee which reviews them and recommends changes.

Finally, I regard the emphasis in the majority opinion on the fact that women have to pay income tax on the first outfit provided to them without cost as nit-picking. When the men buy their business wear apparel they pay the full price without any tax deduction, the amount being far more substantial than the income tax based on the cost of the clothing received by the women. Women, of course, have to keep their ensembles in repair and cleaned. So do the men. Any replacements must be paid for by the women. Likewise the men must pay for the clothing they wear.

Opponents of the Equal Rights amendment have argued that its adoption would be followed by extreme applications bordering on the ridiculous where no meaningful discrimination exists. The result reached by the majority opinion in the application of the statute I can only regard as adding strength to that argument.

APPENDIX B

448 F. Supp. 79 (1978)

MARY M. CARROLL, on behalf of herself
and all others similarly
situated, Plaintiff,

v.

TALMAN FEDERAL SAVINGS AND
LOAN ASSOCIATION OF
CHICAGO, Defendant.

No. 76 C 1729.

United States District Court,
N. D. Illinois, E. D.

Feb. 28, 1978.

Female employee of savings and loan brought action against the savings and loan based on alleged sex discrimination. The District Court, Flaum, J., held that the savings and loan's dress policy, which required women to wear either a color coordinated skirt or slacks and either a jacket, tunic or vest and which required only that men wear business suits or business-type sport jackets and pants and ties did not violate the Civil Rights Act.

Judgment for defendant.

1. Civil Rights—9.14

The intent of Congress in enacting Title VII was to ensure that all males and females have equal job opportunities. Civil

Rights Act of 1964, § 701 et seq. as amended 42 U. S. C. A. § 2000e et seq.

2. Civil Rights—9.14

Requirement of bank that female employees wear particular clothing, being permitted to choose between five basic items in any combination, including a color coordinated skirt or slacks and either a jacket, tunic or vest, with requirement that those "career ensembles" be worn every business day except the last Tuesday of every month and one week in August and one week in December did not violate the Civil Rights Act, even though men were not required to wear such "career ensembles," although they were required to wear business suits or a combination of a business-type sport jacket and pants and were required to wear ties and received no dispensation.

Michael T. Welch, Winston & Strawn, Chicago, Ill., for plaintiff.

Robert A. Deane, Stephen L. Ruff, Ruff & Grotefeld, Ltd., Chicago, Ill., for defendant.

MEMORANDUM OPINION

FLAUM, *District Judge:*

The instant lawsuit is brought as a class action for declaratory, injunctive and monetary relief on behalf of all female employees of defendant Talman Federal Savings and Loan Association of Chicago [Talman] who have been limited in their choice of dress which they are allowed to wear at work. Suit is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq*. Several motions are presently pending before the court. Both parties move for summary judgment. Plaintiff also moves for certification of a class of employees who are required to conform to the allegedly discriminatory dress code. Fed. R. Civ. P. 23(c). Since the court grants defendant's motion for summary judgment it does not reach the class issue. After a brief outline of the facts which

are not in dispute, the sole legal issue presented by this case shall be discussed.

The defendant, Talman, is a savings and loan association with its main office located in Chicago. The association, which has eight branch offices, employs approximately 800 persons. Plaintiff challenges defendant's policy that requires females to wear certain kinds of dress. Although she characterizes this policy as a "uniform policy" it is readily apparent that female employees have far more discretion than they would if they were required to wear uniforms. Under the policy, females are permitted to wear five basic items in any combination they choose. Females must wear either a color coordinated skirt or slacks and either a jacket, tunic or vest. The skirt can be pleated, gored, or straight. The tunic can be belted or unbelted. Choice of blouses, sweaters and hosiery is subject to the discretion of the female employees. These "career ensembles" are required to be worn every business day except the last Tuesday of every month and a week in August and the week between December 25 and January 1. These two weeks are called glamour days and female employees are required to wear "appropriate business attire" at those times.

Until March, 1974 defendant paid half the cost of the uniform while the employee was required to pay the other half. Since March, 1974 defendant has paid the cost of one ensemble for each employee. However, the defendant treats the delivery of such uniforms as income and withholds the amount from each woman's pay based upon the value of the uniform. If employees wish additional items, they must purchase them at their own expense. Of a total of 675 teller, office and managerial personnel, 525 are women who must wear the ensembles. This group includes a senior vice-president and treasurer of defendant.

The men are not required to wear a career ensemble of any kind. From approximately 1958 to 1969, defendant supplied suits to its male tellers and required that they be worn during work. The program was discontinued at the request of the male

tellers. The defendant's dress code policy currently requires that men wear business suits or a combination of a business-type sport jacket and pants. Ties are also required to be worn. Men receive no dispensation from this requirement on the last Tuesday of each month or during the so-called glamour days. The dress code does not further define what a business suit or business-type sport coat is.

The branch or home office manager determines what is or is not appropriate business attire on a strictly *ad hoc* basis. The manager determines the appropriateness of the females' discretionary choices in the same manner. Defendant's personnel manager testified at his disposition that certain managers had permitted males to wear "leisure" type suits as long as they wore ties.

Plaintiff was hired March 5, 1973 as a part-time employee. From 1973 to 1976, she attended De Paul University while working for the defendant from 14 to 18 hours per week. Prior to May 11, 1976 plaintiff conformed to defendant's dress code. On May 11, 14 and 18 plaintiff appeared at work dressed in appropriate business attire. On May 21, she stated to her superiors that she no longer intended to wear the "uniform." On May 22 she received a written memorandum from her superiors that stated she would be indefinitely suspended without pay until she donned her "career ensemble." Up to that time plaintiff had been considered a model employee who performed all of her duties satisfactorily. The sole reason for her suspension was her refusal to wear any of the career ensemble coordinated dress. Plaintiff was graduated from DePaul in June of 1976 and has been employed by the City of Chicago as a substitute teacher since September of 1976. She intends to return to Talman after resolution of her case on a part-time basis.

The case before the court appears to be one of first impression. The parties have not cited to the court, nor has the court in its own research discovered a case which is factually apposite.

The precise issue before the court is whether a dress code which is applicable to both men and women but is more restrictive as to women violates Title VII. In considering such a question, the court is guided by the general precept that Title VII must be construed liberally to achieve its objectives. *See Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 929 (5th Cir. 1975). The court must also note that Title VII requires "an interpretation animated by the broad humanitarian and remedial purposes underlying the federal proscription of employment discrimination." *Coles* v. *Penny*, 174 U. S. App. D. C. 277, 285, 531 F. 2d 609, 616 (1976).

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past.

Sprogis v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir. 1971), *cert. denied*, 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 (1972).

Pointing to such language in *Sprogis* and other cases which are factually inapposite, plaintiff argues that Title VII mandates the elimination of any terms or conditions of employment which treat similarly situated male and female employees differently. Specifically, plaintiff argues defendant by its dress codes has isolated one group on the basis of sex. The direct consequence of this policy is to establish different terms and conditions of employment for men and women. Defendant counters that employer specifications requiring different modes of dress and grooming for men and women do not constitute sex discrimination. Inasmuch as the defendant's dress code does not significantly impair employment opportunities or benefits of either sex, defendant argues, it is not cognizable under Title VII even though such code makes different requirements on the basis of sex.

At the outset it must be noted that there is no suggestion in the present case that the differing standard is a mere pretext for limiting employment to one sex. A claim that a dress code was created and enforced for such a purpose would state a claim under Title VII. *See Earwood* v. *Continental Southeastern Lines, Inc.*, 539 F. 2d 1349, 1351 (4th Cir. 1976); *Jarrell* v. *Eastern Air Lines, Inc.*, 430 F. Supp. 884, 892 (E. D. Va. 1977). Indeed in the present case, the vast majority of employees of defendant are women.

[1] Although there are no cases factually apposite, the general rule appears settled that distinctions based on sex in dress codes do not violate Title VII. "It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not sex discrimination within meaning of Title VII." *Fountain* v. *Safeway Stores, Inc.*, 555 F. 2d 753, 755 (9th Cir. 1977). *See also Barker* v. *Taft Broadcasting Co.*, 549 F. 2d 400 (6th Cir. 1977); *Earwood* v. *Continental Southeastern Lines, Inc.*, 539 F. 2d 1349 (4th Cir. 1976); *Longo* v. *Carlisle DeCoppet & Co.*, 537 F. 2d 685 (2d Cir. 1976) (*per curiam*); *Knott* v. *Missouri Pacific Railroad Co.*, 527 F. 3d 1249 (8th Cir. 1975); *Willingham* v. *Macon Telegraph Publishing Co.*, 507 F. 2d 1084 (5th Cir. 1975) (en banc); *Baker* v. *California Land Title Co.*, 507 F. 2d 895 (9th Cir. 1974), *cert. denied*, 422 U. S. 1046, 95 S. Ct. 2664, 45 L. Ed. 2d 699 (1975); *Dodge* v. *Giant Food, Inc.*, 160 U. S. App. D. C. 9, 488 F. 2d 1333 (1973) (*per curiam*); *Fagan* v. *National Cash Register Co.*, 157 U. S. App. D. C. 15, 481 F. 2d 1115 (1973). This rule is premised on the fact that such restrictions do not amount to a restriction in employment opportunity. The intent of Congress in enacting Title VII was to ensure that all males and females have equal job opportunities.

> We perceive the intent of Congress to have been the guarantee of equal job opportunity for males and females. Providing such opportunity is where the emphasis rightly

> lies. This is to say [Title VII] should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual *because* the individual is either male or female.
>
> * * * * *
>
> . . . Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race or national origin. Similarly, an employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.

Willingham v. *Macon Telegraph Publishing Co.*, 507 F. 2d at 1091 [emphasis in the original]. *See also Earwood* v. *Continental Southeastern Lines, Inc.*, 539 F. 2d at 1351.

Plaintiff attempts to distinguish the above cases by arguing that in most of them there was not a complete relationship between gender and the regulation and that therefore there was no gender-based discrimination. For example, in the so-called hair cases there are two classes: one class consists of long-haired males; the second, females who are permitted to have long hair and short-haired males. Not all the cases have such factual distinctions. In *Fountain,* for example, the male plaintiff was required to wear a tie. This requirement applied exclusively to males as a class. There was a complete relationship between gender and the regulation. The court ruled there was no violation. In *Jerrell* v. *Eastern Air Lines, Inc.*, 430 F. Supp. 884 (E. D. Va. 1977), a female flight attendant challenged the defendant's weight regulations which required that females be lighter proportionately to the population than males. There was again a differing, more onerous, standard applicable to females

but not males. Noting that the airline weight program did not limit employment opportunities for women, the court ruled plaintiff had not established a violation of Title VII. *See also In Re National Airlines, Inc.*, 434 F. Supp. 269 (S. D. Fla. 1977) [no Title VII violation where only 22% of females in the United States can meet the average maximum weight limitations while 30% of the men in the United States could reach the average maximum weight.][1] As long as such practices are not a bar to employment opportunity no violation exists. An employer is not required to account for personal preference. "We have then a situation where a male was indeed employed, and with full knowledge of the company's policy, insisted upon performing his own work on his own terms and upon requiring the company to accommodate to his projection of his own image." *Fagan* v. *National Cash Register Co.*, 157 U. S. App. D. C. at 22, 481 F. 2d at 1122.

Plaintiff also cites a series of cases where discrimination on the basis of sex was found violative of the Act. In *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), *cert. denied,* 404 U. S. 991, 92 S. Ct. 536, 30 L. Ed. 2d 543 (1972), the defendant airline had a no marriage policy for its female employees. Male flight attendants were not subject to a similar regulation. The plaintiff, a female flight attendant, was discharged after she was married. In *Allen* v. *Lovejoy,* 553 F. 2d 522 (6th Cir. 1977) females were required upon marriage to sign certain forms changing their names to that of their husbands. When the plaintiff refused, she was discharged. A female

1. Plaintiff cites *Laffey* v. *Northwestern Airlines, Inc.*, 366 F. Supp. 763 (D. D. C. 1973) as the "closest case on point." However, *Laffey* involved a general policy of discrimination in pay, seniority and the filling of job openings. The defendant also had a policy prohibiting female cabin attendants from wearing eyeglasses and requiring that females use a different type of luggage than males. The focus on the case was on violations of the Equal Pay Act, 29 U. S. C. § 206(d) as well as Title VII. *Laffey* did not discuss a dress code applicable to both sexes but more restrictive as to one. To the extent, if any, that *Laffey* applies in this case, therefore, this court declines to follow it.

was discharged after refusing to comply with the sexual advances of her superior in *Barnes* v. *Costle*, 183 U. S. App. D. C. 90, 561 F. 2d 983 (1977).[2] The above cases are distinguishable on two grounds. First, in each case the requirement applied exclusively to one gender-based class entirely excluding the other. In the present case, the regulation is applicable to *both* classes, but merely places a different restriction on one class. Second, in each case the regulation discriminated against a sexual class for the exercise of a fundamental right or operated to infringe a traditionally protected privacy interest.

> Discrimination based on either immutable sex characteristics or constitutionally protected activities such as marriage or child rearing violate [Title VII] because they present obstacles to employment of one sex that cannot be overcome. On the other hand, discrimination based upon factors of personal preference does not necessarily restrict employment opportunities and this is not forbidden.

Earwood v. *Continental Southeastern Lines, Inc.*, 539 F. 2d at 1351. Clearly, wearing a particular mode of clothing does not amount to a fundamental right. Although the right to wear a certain mode of dress is clearly constitutionally protected, such protection does not normally extend to deprivations by private employers. *Id.* at 1351.[3]

2. *See also Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971) (*per curiam*) [employee's policy of accepting applications from men with pre-school children but not from women violated Title VII].

3. This case does not involve seemingly neutral characteristics which operate to prevent females from gaining employment as in *Dothard* v. *Rawlinson*, 433 U. S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977). In *Dothard*, the statutory height and weight requirements applied equally to men and women. The Court held statistical proof that the requirements would eliminate 41.14 percent of the female population from consideration for employment while eliminating less than one percent of the male population established a *prima facie* case of discrimination. Here, the plaintiff has gained employment but must wear certain clothing as a condition to employment. Such a requirement does not constitute "artificial, arbitrary, and

(Footnote continued on next page.)

[2] Defendant's requirements do not prevent employment opportunity. The court, therefore, holds there is no Title VII violation where an employer discharges an employee who refused to abide by dress regulations which are in fact applicable to both sexes but as to one sex imposes a more defined standard of uniformity. Accordingly, defendant's motion for summary judgment is granted and this case is dismissed. Judgment is entered for the defendant.

It is so ordered.

(Footnote continued from preceding page.)

unnecessary *barriers*" to employment. *Griggs* v. *Duke Power Co.*, 401 U. S. at 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 [emphasis supplied].

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 18, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LATHAM CASTLE, *Senior Circuit Judge**
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

MARY CARROLL,
Plaintiff-Appellant,

No. 78-1458 *vs.*

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 C 1729

Joel M. Flaum,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by de-

* Judge Castle voted as a member of the panel but did not participate in the vote on the rehearing *en banc* suggestion.

fendant-appellee, Talman Federal Savings and Loan Association of Chicago, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Judges Pell, Tone and Bauer voted to grant the petition for rehearing *en banc*.

Supreme Court, U. S.
FILED
FEB 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1111

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Petitioner,

vs.

MARY M. CARROLL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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MICHAEL T. WELCH,
DAVID L. LEE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1111

TALMAN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Petitioner,

vs.

MARY M. CARROLL, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

The Respondent, Mary M. Carroll, on behalf of herself and all others similarly situated, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case.

QUESTION FOR REVIEW.

Does a gender-based dress code that permits men employees to wear any clothing that constitutes appropriate business attire, but requires women employees to wear a specified uniform, constitute sex discrimination with respect to terms or conditions of employment under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964?

STATEMENT OF THE CASE.

I.

TALMAN'S REQUIREMENT THAT WOMEN WEAR UNIFORMS.

Talman Federal Savings and Loan Association of Chicago ("Talman") is a savings and loan association with its main office in Chicago, Illinois. Talman employs approximately 800 people, 675 of whom are office and managerial employees and tellers. P. App. 29-30.[1]

By a written rule, which it enforces, Talman requires all of its women tellers, women office workers, and women managers to wear a specific type, color, and style of uniform made by a certain manufacturer. No such requirement is placed upon the men tellers, managers and office personnel of Talman. P. App. 113-115. Under this dress code, codified in the Talman Personnel Policies Manual, all women employees—from tellers to the sole female senior vice president—must wear a prescribed two-piece uniform while at work. P. App. 113-115.

Although in this litigation Talman has euphemistically referred to the uniform as a "career ensemble," in Talman's own internal memoranda, the "career ensemble" is frequently called a uniform. *See, e.g.*, P. App. 106-112. Twice a year, Talman chooses a new uniform for all women employees, and the individual uniforms are then ordered from the same manufacturer. P. App. 31-32. The women employees must wear this uniform while at work. They are not permitted to wear other clothing, even clothing that closely resembles the designated uniform. P. App. 113-115. For example, if the current uniform is orange (such as the uniform shown in the photograph, Petition for

1. "P. App." refers to Plaintiff's Appendix filed in the Seventh Circuit.

Certiorari at A4), only that particular orange uniform may be worn. No women employees of Talman may substitute a neutral business dress or suit for the uniform. Talman also specifies what women shall wear with the uniform, restricting the color and type of blouse and the type of hosiery which may be worn. P. App. 36-37, 86-88. The result is that all Talman's women employees wear identical uniforms of the same color, material, cut, and manufacture.

None of Talman's men employees wear uniforms except low-level employees such as couriers, janitors and maintenance staff.[2] All other men employed by Talman, including office and managerial staff and tellers, have a simple, practical dress code, which permits men to wear "appropriate business attire." P. App. 60. Talman defines this as follows:

> Men may wear either the customary business suits or a combination of business-type sport jacket and pants. Ties shall be worn by men. P. App. 113.

Talman has no other written definition of what constitutes appropriate business attire for males. P. App. 60. Talman has no rule regulating the color, type, style or pattern of apparel that can be worn by its men employees. P. App. 60. Indeed, Talman permits men employees to wear "leisure suits" with shirts and ties. P. App. 59-72.

From about 1958 to 1969, Talman did require its male tellers to wear a certain type of business suit at work; this restriction was eliminated at the request of a few of the part-time male tellers, who found it inconvenient. P. App. 57, 59. Talman then decided that "appropriate business attire" sufficiently regulated

2. Talman has 19 male couriers and supply room personnel who are required to wear a different type of uniform. P. App. 54-55. In addition, Talman's guards, parking lot attendants, and supply room, housekeeping, and maintenance employees, are required to wear a designated uniform while on duty. However, in each case in which both men and women are employed in these positions, both men and women are required to wear the designated uniform. P. App. 54-56.

the dress of all its men tellers, office workers, and managerial staff. P. App. 59-60.

Talman's women employees must wear the uniform every day except the last Tuesday of each month and the week between December 25 and January 1, ironically called "glamour days." P. App. 40-41, 73-74. Talman's women employees wear "appropriate business attire" on "glamour days." P. App. 40-41, 73-74. Although Talman has, without support in the record, suggested otherwise in its Petition for Certiorari, Talman admits that many different types of clothing worn by its women employees on "glamour days" constitute appropriate business attire and that the vast majority of its women employees have consistently worn appropriate business attire on "glamour days." P. App. 77, 82, 89.

The determination whether a woman's clothing on a "glamour day" constitutes "appropriate business attire" is made by each Talman branch manager, subject to the advice and direction of Erhardt Hilgendorf, Talman's Manager of Personnel. P. App. 77-80. Only rarely has a branch manager informed a woman employee that her clothing was unacceptable. There is no evidence that a woman employee of Talman has ever worn clothing which required further action; indeed, the evidence indicates the vast majority of Talman's women employees have worn appropriate business attire to work on "glamour days." P. App. 77-83, 89.

The procedure used to regulate the clothing of women employees on "glamour days" is used to monitor the dress of Talman's men employees every day. The appropriateness of the clothing worn by Talman's men employees is determined on an *ad hoc* basis by the branch manager, subject to the advice and direction of Hilgendorf. P. App. 60-65, 77.

The stated purpose of the "women *must* wear uniforms/men *may* wear appropriate business attire" dichotomy promulgated by Talman is to insure that Talman employees present a busi-

ness-like appearance to its customers. P. App. 83-85. However, as noted by the Seventh Circuit, Talman has both directly and indirectly articulated another reason why it forces women to wear a uniform. Petition for Certiorari at A10-A11. Before the Seventh Circuit, Talman's counsel, without any support in the record, stated:

> the selection of attire, of clothing on the part of women is not a matter of business judgment. It is a matter of taste, a matter of what the other women are wearing, what fashion is currently. When we get into that realm * * * problems develop. Somehow, the women who have excellent business judgment somehow follow the fashion, and the slit-skirt fashion which is currently prevalent * * *. They tend to follow those [fashions] and they don't seem to equate that with a matter of business judgment. Petition for Certiorari at A11.

Talman believes that requiring women to wear the uniform is necessary "to avoid competition in dress among female employees." P. App. 30-31. Without any support in the record, Talman also believes that without a dress code, the problems of defining appropriate business attire for women would be "endless." (*See* Brief of Defendant-Appellee Talman, filed in the Seventh Circuit, at 47-48). Thus, Talman argues that the only way to insure that women wear appropriate business attire is to put them in uniform. (*Id.* at 49).

II.

CARROLL'S REFUSAL TO WEAR THE UNIFORM.

Mary Carroll ("Carroll") was hired as a part-time employee by Talman in 1973, when she was a university student. By 1976, Carroll had become a savings counsellor trainee. Talman considered Carroll an above-average employee, and raised her pay many times. A. 31-52.[3] Before May 11, 1976, Carroll wore the

3. "A." refers to Plaintiff's Appendix to Memorandum in Support of Her Motion for Summary Judgment filed in the District Court.

uniform while at work. Petition for Certiorari at A25. On four days in that month, Carroll did not wear the uniform. *Id.* The District Court specifically found that the clothing she wore on these days was appropriate business attire. *Id.* A branch manager of Talman warned Carroll on each of the first three days that she must wear the uniform at work. On the fourth day, Carroll refused to wear the uniform; a Talman branch manager ordered her to see Mr. Hilgendorf, who administered the rule requiring women to wear the uniform. Carroll met with Hilgendorf and Thomas Prost, a senior vice president of Talman, and told them that she did not intend to wear the uniform at work if men were not required to do so as well. Hilgendorf told Carroll that she would be suspended if she refused to wear the uniform, whether or not her clothing was appropriate and regardless of what Talman's male employees wore. Carroll reiterated her refusal to wear the uniform under these circumstances and the meeting ended. P. App. 49-52. On May 22, 1976, Talman notified Carroll by written memorandum that she was suspended indefinitely without pay until she reported for work in uniform. P. App. 117.[4]

III.

PROCEDURAL POSTURE OF THIS CASE.

Before suing Talman in District Court, Carroll exhausted her administrative and state remedies. On October 2, 1973, Carroll had filed a Charge of Discrimination with the Equal Employment Opportunity Commission alleging that Talman's uniform policy discriminated against her on the basis of sex. A. 1. The EEOC conducted a thorough investigation and attempted a conciliation between the parties. A. 6-8. However, the

4. Without citing any authority, Talman asserts that since suspension of its requirement that women wear the uniform, Talman has had problems with its women wearing "unbusinesslike clothing." Petition for Certiorari at 12. This bald statement has no support in the record and contradicts Talman's own admission that its women dress properly on "glamour days."

Counter-Proposal submitted to the EEOC by Talman merely reiterated the latter's existing policy by suggesting that women be required to wear the uniform and men could wear "career ensembles" consisting of any "business suit or business-like sport jacket, pants, and tie." A. 19-25. The EEOC then issued a Determination in which it found that there was reasonable cause to believe that Talman's uniform policy violated Title VII. P. App. 18-19. After its conciliation efforts failed, the EEOC issued a "Right to Sue" letter to Carroll on February 13, 1976. P. App. 20. Carroll filed this suit in a timely fashion on May 7, 1976.

Talman has admitted, and the District Court specifically found, that the sole reason for Carroll's suspension was her failure to wear the uniform while at work. P. App. 47-48, Petition for Certiorari at A25. Talman has not contended that any of the clothing worn by Carroll on the four days in May was inappropriate. Talman's position was and is that a woman employee may be suspended for failing to wear the uniform, even if her clothing is appropriate business attire. P. App. 52. Talman has refused to recognize any alternatives to the mandatory uniform policy, although, as the Seventh Circuit recognized, such alternatives (*e.g.*, making the uniforms optional) exist. Petition for Certiorari at A8. In addition, Talman has accused Carroll of being "disruptive" and of breaching her duty of loyalty to Talman by her "attacks." Brief of Defendant-Appellee Talman, filed in the Seventh Circuit, at 61-62. Because of Talman's intransigence, Carroll was compelled to file suit.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The central question is: does an employer violate Title VII by requiring all its women employees to wear a prescribed uniform while permitting its men employees to wear any "appropriate business attire"? Under the plain language of Section 703(a)(1) of Title VII and this Court's decision in *Los Angeles Dep't of Water & Power* v. *Manhart*, such a dress code clearly establishes a *prima facie* case of sex discrimination. The two sexes are treated differently, and the only basis for the differential treatment is the employee's sex. Talman proved no affirmative defense to this *prima facie* case. Talman has shown neither a business necessity nor a *bona fide* occupational qualification ("bfoq"), the two affirmative defenses to discrimination recognized by the courts.

Talman argues that the decision of the Seventh Circuit conflicts with the decisions of seven other circuits. This argument is utterly misleading. The decisions in question hold that not every form of differential treatment of the sexes is discrimination. The Seventh Circuit agreed with that principle, simply holding that the facts of this case showed discrimination. Further, the other cases were all decided before *Manhart*, and the more recent decisions of the "conflicting" courts of appeal show that they agree with the result reached by the Seventh Circuit in this case.

Finally, analogies to other forms of discrimination, such as race, highlight the existence of discrimination in the instant case. Surely, a policy requiring all black employees to wear uniforms and permitting all white employees to wear appropriate business attire would constitute an egregious form of racial discrimination.

REASONS FOR DENYING THE WRIT.

I.

INTRODUCTION.

The central question in this case is: does an employer violate Title VII by requiring all women employees to wear a prescribed uniform while permitting men employees to wear any appropriate business attire? The Seventh Circuit properly addressed this question by considering first, whether Talman's dual dress code established a *prima facie* case of discrimination in violation of Title VII, and, second, whether any business necessity requires such discrimination. The Seventh Circuit refuted Talman's suggestions that the "long hair" cases control the case and that public policy sanctions a requirement that women wear uniforms.

II.

THE SEVENTH CIRCUIT WAS RIGHT ON THE MERITS.

A. Carroll Has Established a Prima Facie Case of Sex Discrimination Under Title VII.

Talman's written, enforced policy requiring all women tellers, women office workers, and women managers to wear the uniform, without any similar requirement for Talman's comparable men employees, constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Section 703(a)(1) of Title VII, 42 U. S. C. § 2000e-2(a)(1), provides that it shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

To prove a Title VII violation, Carroll need only establish that the challenged regulation does in fact discriminate against women. If she does, the burden then shifts to the employer to prove that some business necessity or a *bona fide* occupational qualification justifies the discriminatory regulation. *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973); *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977).

As the Seventh Circuit stated, the requirement to wear the uniform is obviously a term and condition imposed by Talman on all women employees. Petition for Certiorari at A2-A3. No such term or condition exists for similarly situated men employees. This disparate treatment of Talman's employees with respect to a term and condition of employment constitutes an illegitimate classification of employees based solely on sex, and Carroll has therefore established a *prima facie* case of sex discrimination.

This result is compelled by the recent, definitive decision of this Court in *Los Angeles Dep't of Water & Power* v. *Manhart,* 435 U. S. 702 (1978), which Talman virtually ignores in its Petition. In *Manhart,* the employer's pension plan required women employees to contribute approximately 15% more to the fund than similarly situated men in order to receive equal benefits. The differential was based on actuarial tables indicating that women, as a class, live longer than men and that the cost of their pensions therefore is higher. Nevertheless, the Supreme Court held that the pension program violated Section 703(a)(1), stating that this section focuses on individual characteristics rather than the characteristics of a class to which the individual belongs. Since the employer's policy treated men and women differently, and since the only basis for the disparate

treatment was the individual's sex, the Court held that the practice constituted discrimination because it

> does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different." 435 U. S. at 711.

In the case at bar, as in *Manhart*, the rule in question differentiates between women, all of whom are required to wear the uniform, and men, none of whom wear a uniform. There is complete identity between sex and the uniform policy: neither group contains any member of the opposite gender and each group contains all members of one gender. Thus, Carroll has established a *prima facie* case of sex discrimination under Title VII.

This Court has reached the same result in other situations in which similarly situated men and women were treated differently. *See, e.g., Reed* v. *Reed,* 404 U. S. 71 (1972), *Frontiero* v. *Richardson,* 411 U. S. 677 (1973), *Stanton* v. *Stanton,* 421 U. S. 7 (1975), *Craig* v. *Boren,* 429 U. S. 190 (1976), *Weinberger* v. *Wisenfeld,* 420 U. S. 636 (1975), *Califano* v. *Goldfarb,* 430 U. S. 199 (1977), and *Dothard* v. *Rawlinson,* 433 U. S. 321 (1977). The lower courts, of course, have followed these cases. *See, e.g., Tomkins* v. *Public Elec. & Gas Co.,* 568 F. 2d 1044, 1047 n. 4 (3d Cir. 1977).

In summary, when any regulation differentiates between men and women solely on the basis of sex, as does Talman's dual dress code, a *prima facie* case of sex discrimination exists.

B. A "Term or Condition of Employment" Under § 703 (a)(1) Need Not Affect Employment Opportunities.

Talman has argued repeatedly that a gender-based dress code does not constitute sex discrimination because it does not affect the hiring, firing or promoting, *i.e.,* the "employment opportunities", of women. In making this argument, Talman ignores the obvious impact of its own policy: women like Mary Carroll, who refuse to wear the uniform, are suspended without pay. P. App. 48, Petition for Certiorari at A25. Surely there could be no more direct effect on employment opportunities.

Further, the phrase "employment opportunities" appears only in § 703(a)(2)—not in § 703(a)(1), the section under which Carroll sued. Congress clearly intended § 703(a)(1) to cover discrimination that does not affect employment opportunities. *See,* H. R. 7152, 110 Cong. Rec. 7213 (1964) (memorandum submitted by floor managers of Title VII defines "to discriminate" as "to make a distinction, to make a difference in treatment or favor . . .").

The cases have followed this interpretation, repeatedly finding that discrimination exists under facts unrelated to employment opportunities. For example:

1. An employer's rule required newly married women employees to sign forms authorizing the change of their name on personnel forms to that of their husband, with no similar requirement for men. *Allen* v. *Lovejoy,* 553 F. 2d 522 (6th Cir. 1977);
2. Plaintiff's claim that she had been deprived of adequate supporting staff, facilities, and equipment because of her sex stated a cause of action under Title VII. *Flesch* v. *Eastern Pennsylvania Psychiatric Institute,* 434 F. Supp. 963 (E. D. Pa. 1977);
3. Women employees were given two ten-minute breaks per day which were not given to men employees. *Burns* v. *Rohr Corporation,* 346 F. Supp. 994 (S. D. Cal. 1972);
4. Women working near food were required to wear hairnets, while men, although required to wear hats, were prohibited from wearing hairnets. *Roberts* v. *General Mills, Inc.,* 337 F. Supp. 1055 (N. D. Ohio 1971);
5. Women gym teachers were assigned small, open offices while men gym teachers received large, private offices. *Harrington* v. *Vandalia-Butler Bd. of Education,* 418

F. Supp. 603 (S. D. Ohio 1976), *rev'd as to damages and attorneys' fees* 585 F. 2d 192 (1978), *cert. denied* 441 U. S. 932 (1979);

6. Women were not allowed to wear eye glasses, but men were, and women's luggage was strictly regulated as to brand, size, and color, but men's was not. *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D. D. C. 1973), *modified* 567 F. 2d 429 (1976), *cert. denied* 434 U. S. 1086 (1978);
7. Women were not allowed to smoke on the job, but men were. EEOC Dec. No. 71-109, CCH EEOC Rep. ¶ 6165 (1970); EEOC Dec. No. 70-503, CCH EEOC Rep. ¶ 6113 (1970);
8. Women were required to wear sexually provocative costumes, but men performing similar jobs were not. EEOC Dec. No. 77-36, CCH EEOC Rep. ¶ 6588 (1977).

Such an interpretation of "terms and conditions of employment" is not at all unusual. For example, under the National Labor Relations Act, the NLRB has held that "terms and conditions of employment" include dress codes. *Nyari Odette, Inc.*, 229 NLRB 137 (1977), *Concord Docu-Prep, Inc.*, 207 NLRB 981 (1973).

The logic of Talman's argument is that any terms or conditions of employment that do not affect job opportunities can never support a discrimination claim. In *Harrington*, the Sixth Circuit roundly rejected this argument:

> We reject the Board's claim that Section 703(a)(1) of Title VII and its reference to "terms, conditions, or privileges of employment" was not intended to reach the actual working conditions of employees but rather was intended to be confined to the obligation to provide an equal opportunity for employment apart from the physical condition thereof. 585 F. 2d at 194 n. 3.

Pursuing its logic, Talman has insinuated that a gender-based dress code has only a minor effect on a women's employment,

and that judicial intrusion into an employer's decisions in this area is bad public policy. Petition for Certiorari at 25-27, citing *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567 (1978). In *Furnco*, however, the lower court found that no discrimination existed, and therefore prescribed a remedy when there had been no wrong. Here, the Seventh Circuit expressly found discrimination. Further, as stated in *Sprogis* v. *United Airlines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied* 404 U. S. 991 (1971):

> The scope of § 703(a)(1) is not confined to explicit discrimination based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike *at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities *and enjoyment* which have plagued women in the past. (Emphasis added, footnote omitted).

This specific passage was quoted with approval by Mr. Justice Stevens in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U. S. 702, 707, n. 13 (1978) in connection with the Court's finding that it is

> now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. 435 U. S. at 707.

C. No Business Necessity or Bona Fide Occupational Qualification Justifies Talman's Uniform Policy.

Talman has argued that its uniforms are an important competitive measure and contribute to customer relations. Apparently, Talman believes that these reasons justify its uniform policy even if this policy discriminates against women. However, as noted by the Seventh Circuit, the test in Title VII is not merely whether a rule or regulation is "job related" or "reasonably necessary." In order to overcome a *prima facie* case of discrimination, an employer must show either a busi-

ness necessity or that the discriminatory requirement is a *bona fide* occupational requirement. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040 1042-43 (4th Cir. 1976); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir.), *cert. dismissed* 404 U. S. 1006 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

Section 703(e) of the Act, 42 U. S. C. § 2000e-2(e), permits sex discrimination in those certain instances where "sex . . . is a *bona fide* occupational requirement reasonably necessary to the normal operation of that particular business or enterprise." In the recent case of *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), this Court stated that it was "persuaded—by the restrictive language of § 703(e), the relevant legislative history and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was meant to be an *extremely narrow* exception to the general prohibition of discrimination on the basis of sex." 433 U. S. at 334 (emphasis added, footnotes omitted).

Stated another way, the § 703(e) exception applies only if the employer can prove:

> that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to safely and efficiently perform the duties of the job involved. *Id.* at 333 (citation omitted).

Since women are routinely hired at Talman as tellers and office and managerial employees, the same as men, the *bona fide* occupational qualification exception is not applicable. *Chastang* v. *Flynn & Emrich Co.*, 541 F. 2d 1040, 1043 (4th Cir. 1976).

Nor can Talman's uniform policy be justified as a business necessity. A business necessity connotes an "irresistible demand" and must "not only directly foster safety and efficiency of a [business], but also be essential to those goals." *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971); *Waters* v. *Wisconsin Steel Works, International Harvester Co.*,

502 F. 2d 1309, 1321 (7th Cir. 1974), *cert. denied* 425 U. S. 997 (1976). "[B]usiness necessity only justifie[s] a discriminatory business practice where no acceptable alternative policies or practices would accomplish the business purpose advanced with less discriminatory impact." *EEOC* v. *New York Times Broadcasting Service, Inc.*, 542 F. 2d 356, 361 (6th Cir. 1976). As noted by the Seventh Circuit, Talman has several permissible alternatives to the present discriminatory dress code, including requiring women as well as men to wear "appropriate business attire," making the uniform optional for its women employees, or requiring all employees to wear the uniform. Petition for Certiorari at A8. Carroll has never argued that Title VII requires that the uniforms be abolished; rather, Carroll seeks equal treatment for similarly situated employees of both sexes.

III.

NO CONFLICT EXISTS AMONG THE CIRCUITS.

Talman has suggested that the decision of the Seventh Circuit conflicts with the decisions of seven other circuits on the same issue. This statement is erroneous. Virtually all the cases cited by Talman involved the question of whether an employer can require its men employees to have short hair or to be clean-shaven. These so-called "long hair" cases divide employees into two groups; for example, women plus clean-shaven men in one group, bearded men in another. Thus, in light of *Manhart*, the "long hair" cases do not meet the threshold criteria for determination of the existence of sex discrimination, since a "long hair" policy does not create an absolute male-female dichotomy.

The "long hair" cases are both factually and legally distinguishable from the instant case. These cases simply hold that an employer can require his or her employees to present a businesslike appearance to customers by adherence to personal appearance regulations reflecting customary modes of grooming (such as short hair on male employees), which modes in fact

differ between men and women. There is a vast difference between a dress code requiring all employees to appear business-like and a dual system requiring women to wear a uniform while permitting men to choose appropriate business attire. As the Seventh Circuit noted, the courts' of appeals opinions approving "long hair" regulations

> find some justification in commonly accepted social norms. . . . However, the situation is different where, as here, two sets of employees performing the same functions are subjected on the basis of sex to two entirely separate dress codes—one including a variety of normal business attire and the other requiring a clearly identifiable uniform. Petition for Certiorari at A10.

Talman has not, and cannot, argue that any societal expectation or norm requires women to wear a uniform to fulfill an employer's requirement of appropriate business attire. Indeed, quite the opposite is true; as the Seventh Circuit found,

> [T]he disparate treatement is demeaning to women. While there is nothing offensive about uniforms *per se*, when some employees are uniformed and others are not, there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes. Petition for Certiorari at A10.

In contrast to the negative ramification of Talman's uniform policy for women, a societal norm of dress or grooming such as a necktie or short hair is not demeaning to men. Furthermore, all the "long hair" cases cited by Talman as conflicting were decided before *Manhart*. In addition, since their "long hair" decision, both the D. C. Circuit and the Sixth Circuit have held that differences in treatment of men and women employees that do not affect employment opportunities can nevertheless constitute sex discrimination under Section 703(a). *See Harrington* v. *Vandalia-Butler Bd. of Education,* and *Laffey* v. *Northwest Airlines, Inc.*, discussed at 13-14, *supra.*

IV.

ANALOGIES TO THE OTHER FORMS OF DISCRIMINATION COVERED BY TITLE VII SHOW THAT TALMAN'S DRESS CODE DISCRIMINATES ON THE BASIS OF SEX.

The absurdity of Talman's argument that its dress code does not discriminate is highlighted by a simply analogy. Imagine Talman differentiating between its employees' dress on the basis of race, color, religion, or national origin (all *in pari materia* under Section 703(a)(1)). For example, could blacks, but not whites, be forced to wear a uniform in order to "assure" that they would be appropriately dressed?

The courts have held that all cases and statutes which set forth the policy of the law with regard to racial discrimination are applicable in sex discrimination cases. *Barnes* v. *Costle,* 561 F. 2d 983, 986-88 (D. C. Cir. 1977); *Palmer* v. *Central Mills, Inc.*, 513 F. 2d 1040, 1042-43 (6th Cir. 1975), *cf. Los Angeles Dep't of Water & Power* v. *Manhart, supra, Dothard* v. *Rawlinson,* 433 U. S. 321, 329 (1977); *Yuhas* v. *Libby-Owens-Ford Co.*, 562 F. 2d 498 (7th Cir. 1977), *cert. denied* 435 U. S. 934 (1978).

There is certainly no legislative history which suggests that sex discrimination is to be given any less protection than race discrimination. Indeed, House Report No. 92-238, 1972 U. S. CODE, CONG., AND ADMIN. NEWS at 2141, which discussed the need for the 1972 amendments to Title VII, states:

> This Committee believes that women's rights are not judicial divertisements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

CONCLUSION.

In an enviroment in which most top management are men, Talman requires all its women to wear a uniform. As the Seventh Circuit noted, this policy is based upon the stereotyped, and factually unfounded, notion that women do not know what to wear to work. For the reasons stated above, Talman's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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